Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

CITY OF LAKEWOOD,

Petitioner,

v.

FAIR HOUSING FOUNDATION OF LONG BEACH,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit erred in holding that a government contractor can sue a city for retaliating against it for its advocacy efforts under the federal Fair Housing Act, despite its corollary holding that the city's conduct was absolutely protected by, and could not give rise to a retaliation claim under, the First Amendment. In other words, can acts which are absolutely protected by the First Amendment give rise to liability under some other federal statute?

2. Whether the Ninth Circuit erred when it ignored prior precedent and broadly interpreted the "interference" clause of the Fair Housing Act to outlaw protected speech, thereby giving contractors who provide fair housing services extraordinary rights and contractual protections that are not possessed by any other government contractor.

3. Whether the Ninth Circuit erred in holding that a fair housing service provider may bring a civil action to compel a city to allocate funds received from the federal government to that provider, despite the Legislature's express prohibition of such a private right of action.

PARTIES TO THE PROCEEDING

Including the parties named in the caption of this Petition, the parties are:

Petitioner: The City of Lakewood, a municipal corporation.

Respondent: The Fair Housing Foundation of Long Beach, a non-profit California corporation.

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IN THE
SUPREME COURT OF THE UNITED STATES

CITY OF LAKEWOOD

Petitioner,

vs.

FAIR HOUSING FOUNDATION OF LONG BEACH

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The City of Lakewood (the "City"), by undersigned counsel and pursuant to the applicable rules of this Court, requests that the Court issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

This action began as a race discrimination lawsuit brought by the tenants of a housing complex in Lakewood, California against the owners and managers of that complex. The tenants' discrimination claims were reported to the City's contractually-retained fair housing service provider, respondent Fair Housing Foundation of Long Beach ("FHF"). In response, FHF referred the tenants to an attorney, entered into an attorney-client relationship with that attorney, and began working as "paralegal" for the attorney in developing the tenants' case.

During discovery, the tenants allegedly received information regarding discriminatory law enforcement practices by deputies of the Los Angeles County Sheriff's Department. Based

on this information, the tenants amended their Complaint to add the City as a defendant, even though the City was not liable for the deputies' conduct as a matter of law. At the same time, FHF filed a motion to join the tenants' lawsuit as a plaintiff, as well as to assert its own independent claims against the City for "interference with contract." The district court, Judge Wallace Tashima, allowed the tenants to add the City as a defendant, but rejected FHF's attempts to join the tenants' lawsuit and sue the City in its own right.

The City then sued FHF for breach of contract and indemnity. In addition, it declined to renew FHF's contract when it expired. FHF responded by counter-suing the City, alleging that the City's decision not to renew its contract constituted unlawful retaliation in violation of the First Amendment and the state and federal fair housing acts. Thereafter, (1) the tenants' lawsuit was settled without any contribution from the City; and (2) Judge Tashima granted FHF's motion to dismiss the City's breach of contract claim. As a result, only FHF's claims against the City and the City's indemnity claim against FHF remained in the lawsuit.

On May 17, 1999, the district court, Judge Dickran Tevrizian, granted the City's motion for partial summary judgment on FHF's state and federal fair housing act claims and granted FHF's motion for summary judgment on the City's indemnity claim. On October 18, 1999, the district court disposed of the remainder of the case by granting the City's motion for summary judgment on FHF's First Amendment claim. [App. 27a-78a.]

FHF timely filed a notice of appeal, and the Ninth Circuit, in a published opinion, upheld the district court's decision on FHF's First Amendment claim, but reversed its decision on FHF's fair housing act claims. *Walker and Fair Housing Foundation of Long Beach v. City of Lakewood*, 263 F.3d 1005 (9th Cir. 2001). The court found that FHF played a confidential and "policymaking" role for the City, and that the City's alleged retaliation for FHF's advocacy was therefore absolutely protected

by the First Amendment. However, it nonetheless held that this exact same conduct - - alleged retaliation for advocacy efforts - - violated the state and federal fair housing acts.

The City filed a timely petition for rehearing and suggestion for rehearing en banc. On November 1, 2001, the Ninth Circuit denied this petition and issued an amended opinion modifying its original decision. *Walker and Fair Housing Foundation of Long Beach v. City of Lakewood*, 272 F.3d 1114 (9th Cir. 2001) ("*Walker*"). [App. 1a-26a.] Like its predecessor, the amended opinion held that the City could be held liable under the state and federal fair housing acts for speech protected by the First Amendment.

JURISDICTION

Subject matter jurisdiction for the United States District Court for the Central District of California is found in 28 U.S.C. § 1331 because FHF's claims were brought under 42 U.S.C. § 1983 and 42 U.S.C. § 3617. In addition, the district court had supplemental pendant jurisdiction over the related state law claims. Subject matter jurisdiction for the Ninth Circuit Court of Appeals was invoked through these federal statutes and 28 U.S.C. § 1291. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The Ninth Circuit's original decision in this case was entered on August 31, 2001. The City timely petitioned for rehearing and rehearing *en banc*. On November 1, 2001, the Ninth Circuit denied the City's petition for rehearing and issued an amended opinion modifying its original decision.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

A. 42 U.S.C. § 1983: Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

B. Constitution of the United States, Amendment 1: Freedom of Religion, Speech and Press

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

C. 42 U.S.C. § 3617: Interference, Coercion, or Intimidation (Section 818 of the Fair Housing Act, Title VIII of the Civil Right's Act of 1968, as Amended)

It shall be unlawful to coerce, intimidate, threaten or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by Sections 803, 804, 805 or 806 of this Title.

STATEMENT OF THE CASE

A. FHF's Contract With The City

In or about September of 1990, the City entered into a fair housing services contract with FHF. Under the contract, FHF was to plan, implement and administer the City's fair housing program. The contract required FHF to, among other things, offer counseling, outreach and educational assistance to City residents and to process, investigate and conciliate complaints of housing discrimination. The contract was for a one-year term, and was renewed three times, with the last agreement being signed on June 8, 1993. The contract provided that FHF was to function as an independent contractor, and allowed either party to cancel the agreement on 30 days written notice.

The monies used to pay FHF came from Community Development Block Grant ("CDBG") funds received by the City from the United States Department of Housing and Urban Development ("HUD"). In order to receive CDBG funds from HUD, the City was required to "affirmatively further the policies of the Fair Housing Act." *See* 24 C.F.R. § 570.601. Beginning in September of 1990, the City contracted with FHF to perform this function. However, the responsibility for complying with HUD regulations remained with the City as a matter of law, and it alone was accountable to HUD should its fair housing program be deemed deficient. 24 C.F.R. § 570.501(a); 24 C.F.R. § 85.40(a).

The parties' contract gave FHF wide-ranging authority and discretion to implement and administer the City's fair housing program. In addition, by virtue of its position, FHF had access to confidential information regarding the City and its residents. On the basis of this discretionary authority and access, both the district court and the Ninth Circuit held that FHF held a confidential and policymaking position with the City.

B. FHF's Involvement In The Underlying Lawsuit

As explained above, one of FHF's duties under its contract with the City was to process and conciliate housing discrimination complaints. On September 2, 1992, FHF received such a complaint from certain residents of the "Park Apartments" complex within the City, alleging that the management of that complex had discriminated against them based on their race. On September 4, 1992, two days later (and without making any attempt at conciliation), FHF referred the complainants to the law firm of Traber & Voorhees ("T&V"). When it initially approached T&V, FHF asked T&V if it could be a plaintiff in the tenants' lawsuit, and was essentially told that it could not. However, T&V did agree to let FHF work as an "agent," investigator and "quasi-paralegal" for T&V in pursuing the tenants' complaints. In addition, FHF and T&V entered into an attorney-client relationship.

In its capacity as T&V's client, paralegal and agent, FHF exchanged confidential and privileged information with T&V--information it withheld from the City on confidentiality grounds. FHF did not disclose its surreptitious contractual arrangement with or covert work for T&V to the City, despite its existing contract with the City. Moreover, FHF did not advise the City that the tenants had complained of discrimination until January of 1993--months after these complaints were reported and FHF was working for (and was a client of) T&V.

C. FHF's Claims Against The City

FHF's lawsuit against the City seeks redress for the City's alleged violation of 42 U.S. Code § 3617 (the Federal Fair Housing Act or "FHA"), the Civil Rights Act of 1871 (42 U.S. Code § 1983), and § 12955 of the California Fair Employment and

Housing Act ("FEHA").[1] FHF alleges that the City interfered with FHF's activities in providing assistance to the Park Apartment tenants and retaliated against FHF for pursuing its constitutional and civil rights. The interference and retaliation allegedly consisted of the City's criticism of FHF's contractual performance, withholding of payments due under the contract, threats to cancel or not renew the contract, and replacement of FHF with another fair housing organization.

FHF contends that the City's retaliatory acts were triggered by two events. First, on July 30, 1993, FHF held a joint press conference with T&V to announce the filing of the tenants' lawsuit. At this press conference, FHF read a statement which, among other things, alleged that the discriminatory acts at issue in the lawsuit "sen[t] a message to yet another generation of young African-Americans *that they still are not welcome in middle class cities like Lakewood.*" Second, FHF unsuccessfully attempted to join in the tenants' lawsuit and sue the City in its own right. Thereafter, the City declined to renew FHF's contract, and FHF sued the City for violation of its constitutional and civil rights.

D. The Ninth Circuit's Decision And The Reasons For Certiorari

In its opinion in this case, the Ninth Circuit held that FHF could sue the City for retaliating against it for its "advocacy efforts" under the Federal Fair Housing Act, but could not do so under the federal Civil Rights Act because the City's alleged acts were absolutely protected by the First Amendment. *Walker, supra,* at 1120. Supreme Court review of this opinion is warranted because it conflicts with prior Supreme Court and circuit court

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[1] Although this Petition does not ask this Court to address or interpret FEHA, any decision on the Federal Fair Housing Act will also resolve FHF's FEHA claim. *Walker, supra*, at 1125-26.

authority on several important federal questions. In addition, review is necessary to interpret and define the scope of the FHA, particularly in cases where it conflicts with the First Amendment.

First, the Ninth Circuit's opinion conflicts with prior decisions regarding the scope of the FHA and the First Amendment protections available to the City. These decisions establish that: (1) speech cannot constitute unlawful "interference" in violation of § 3617 of the FHA unless it is directed and intended to incite imminent lawless activity; and (2) § 3617 should be narrowly construed as applied to speech. *See, White v. Lee*, 227 F.3d 1214 (9th Cir. 2000); *Michigan Protection & Advocacy Service, Inc. v. Babin*, 799 F.Supp. 695, 719-722 (E.D. Mich. 1992), *aff'd*, 18 F.3d 337 (6th Cir. 1994) ("*Babin*"). The Ninth Circuit's decision herein completely ignores this authority, broadly interprets the interference clause to bar speech, and indicates that the City's speech is only protected by the First Amendment if it constitutes "petitioning," *i.e.*, an attempt to petition another government agency for redress of grievances. This holding contradicts not only prior cases decided under the FHA, but the entire body of constitutional jurisprudence establishing that the First Amendment protects speech irrespective of whether it also constitutes petition activity (provided that, as explained above, it is not designed or likely to incite imminent lawless activity). *See, Babin, supra*, at 720; *White, supra*, at 1230.

Second, the Ninth Circuit's opinion conflicts with prior decisions establishing that a government agency has an absolute First Amendment right to terminate its relationship with "policymaking" employees or independent contractors based on speech because of its need to place loyal confidants in sensitive advisory positions. *Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980); *Pleva v. Norquist*, 195 F.3d 905, 917 (7th Cir. 1999); *Biggs v. Best, Best & Kreiger*, 189 F.3d 989 (9th Cir. 1999); *Williams v. City of River Rouge*, 909 F.2d 151 (6th Cir. 1990). The circuit court specifically found that FHF held such a position, and that it therefore could not seek redress under the First

Amendment if the City retaliated against it for its advocacy of fair housing rights. However, the court nonetheless held that this exact same conduct - - alleged retaliation in response to advocacy - - *could* give rise to liability under the FHA, and placed no limits on FHF's advocacy efforts despite its policymaking role and corresponding need to be ideologically aligned with the City. The City respectfully submits that government agencies either have a constitutional right to end business relationships with contractors who occupy policymaking positions based on their advocacy or they do not, and that it is illogical to hold that the City's actions are completely legal, and indeed *specifically protected* under the First Amendment, but somehow illegal under the FHA. The Ninth Circuit's holding to this effect is not only contrary to prior case law, it creates a situation in which the City has a right to sue FHF for its attempts to use the FHA to curtail the City's speech, whereas FHF has a reciprocal right to sue the City for its speech under the FHA. Compare *White, supra*, at 1229-30 with *Walker, supra*, at 1120. The intervention of this Court is needed to reconcile these competing interests and define the scope of the interference clause of the FHA as it relates to speech.

Third, the Ninth Circuit's opinion is inconsistent with prior case law because it gives fair housing service providers unique and extraordinary rights which are not possessed by any other government contractor. Other contractors terminated for speech or advocacy must resort to the First Amendment, which will deny them protection if they are policymakers. On the other hand, policymaking fair housing providers can "trump" a government agency's supposedly absolute First Amendment right to decline to associate or do business with them based on their speech or advocacy simply by resorting to the FHA. Not only is this outcome inherently illogical, the problem is compounded by the fact that, because of the nature of the services performed, anything a public entity does to enforce its contractual rights against a housing service provider or influence the provider's contractual performance will necessarily constitute "interference" under § 3617 of the FHA (particularly given the Ninth Circuit's very broad

interpretation of this term). Giving housing providers such exceptional rights and powers will alter the parties' at-will relationship, curtail public entities' bargaining power and contractual rights, and subject government entities to lawsuits under the FHA anytime they seek to end a business relationship with a housing service provider.

In summary, this Petition presents an important federal question, to wit, whether a government agency can be forced to contract in perpetuity with a fair housing provider that engages in hostile advocacy because that contractor has extraordinary rights under the FHA for contract-based disputes, even though the termination of the provider's contract is expressly protected under the First Amendment. Resolving this issue will require the Court to rectify the Ninth Circuit's opinion herein with contrary authority regarding which provision - - the FHA or the First Amendment - - takes precedence in a situation where the two are at odds, as well as to define the scope of the "interference" clause of the FHA as it relates to speech. In addition, it will require the Court to evaluate conflicting authority regarding a third federal statute, the Housing and Community Development Act, which must also be harmonized with the FHA in light of FHF's claimed entitlement to funds allocated under that Act.

ARGUMENT

A. The Ninth Circuit's Opinion Conflicts With Prior Decisions Establishing That Speech Cannot Give Rise To Liability Under The FHA Unless It Is Intended And Likely To Incite Imminent Lawless Activity

Section 3617 of the FHA makes it unlawful to coerce, intimidate, threaten or interfere with any person or entity because of that person or entity's attempts to secure or advance rights protected by the FHA. 42 U.S.C. § 3617. Here, the Ninth Circuit construed the term "interference" to encompass any act which might "meddle in" or "hamper" FHF's activities. *Walker, supra,*

at 1129. It then found that the City's verbal and written commentary regarding FHF's contractual performance could constitute unlawful interference under this definition. *Id.* This holding is contrary to prior decisions limiting the interference clause when speech is at issue. In addition, it directly conflicts with this Court's pronouncements regarding when, and under what circumstances, speech loses its constitutional protection.

First, the Ninth Circuit broadly interpreted the interference clause of the FHA to encompass any speech which "meddled in" FHF's activities. Not only does this holding prevent the City from voicing any opinions or concerns about the job performance of a contractor *that is supposed to be performing services for it*, the court's broad interpretation of the interference clause to encompass speech is contrary to prior decisions holding that this provision should be narrowly construed when speech is at issue. *Babin, supra*, at 720; *White, supra*, at 1230.

Second, the Ninth Circuit held that the City could be liable under the FHA for statements it supposedly made which were critical of FHF, unless those statements constituted "'petitioning' within the meaning of *Manistee [Town Ctr. v. City of Glendale*, 227 F.3d 1090, 1093-94 (9th Cir. 2000).]" *Walker, supra*, at 1130, n. 5. In addition, the court indicated that a fair housing provider could allege an "injury in fact" sufficient to invoke the FHA based on critical statements made in newspaper articles and to government agencies. *Id.* at 1123-24. In so holding, the Ninth Circuit overlooked its own, directly contrary, decision in *White v. Lee*, 227 F.3d 1214 (9th Cir. 2000), as well as the principles behind, and entire body of, First Amendment jurisprudence.

In *White, supra*, the Ninth Circuit found that a group of neighbors who advocated against, and filed a lawsuit to prevent, the placement of housing for the disabled in their neighborhoods could not be held liable under the interference clause of the FHA. In addition, the court held that attempts by HUD to curtail the neighbors' activities *violated the neighbors' First Amendment*

rights, notwithstanding HUD's argument that it was merely attempting to enforce the FHA. *Id.* at 1229.

In reaching this decision, the court specifically found that the "interference" clause of 42 U.S.C. § 3617 could not be broadly interpreted to apply to all speech which violates the literal terms of the FHA because such an interpretation would chill First Amendment activity. *Id.* at 1230. The Court noted that one person's speech could easily interfere with another person's ability to secure housing and, if it construed § 3617 to bar such activity, a wide range of speech regarding the housing rights of others would be rendered illegal - - an outcome that would itself violate the First Amendment. *Id.*[2]

Accordingly, the *White* court concluded that "a speaker's advocacy of his views, however 'ill-advised, uninformed and even distasteful' can amount to a violation of § 3617 of the FHA only in the event that the advocacy is directed to inciting or producing imminent violence and is in fact likely to do so." *Id.* at 1230. This holding is consistent with the decisions of this Court and other circuit courts establishing that speech can only violate the First Amendment if it "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenberg v. Ohio*, 395 U.S. 444, 447, 89 S.Ct 1827, 23 L.Ed.2d 430 (1969); *Hess v. Indiana*, 414 U.S. 105, 108-09, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973); *United States v. Hayward*, 6 F.3d 1241, 1250 (7th Cir. 1993), *cert. denied*, 511 U.S. 1004 (1994), citing *RAV v. City of St. Paul*, 505 U.S. 377, 112 S.Ct. 2538, 2541, n. 1 (1992); *Babin, supra*, at 720.

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[2] HUD itself had previously come to the same conclusion, and issued a directive preventing its employees from pursuing retaliation cases which sought redress for speech or opposition efforts. *See* HUD Memorandum of Procedural Limitations for Cases that Implicate the First Amendment, dated September 2, 1994.

The *Walker* court completely ignored this binding precedent and instead indicated that the City could be held liable under the "interference" clause of § 3617 for alleged speech that was critical of FHF (*i.e.*, criticism and complaints to FHF or other cities regarding FHF or its contract performance) or meddled in its activities, even though that speech was plainly not designed to incite, or likely to incite, imminent lawless activity. In fact, the Court opined that the City's critical *speech* was only protected if it constituted "petitioning," *i.e.*, an attempt to lobby another government agency for redress of a grievance. The court's finding that the Constitution only applies to speech that rises to the level of "petitioning" is in direct conflict with the entire body of case law establishing that speech is protected by the First Amendment as long as it is not likely to incite imminent lawless activity. *Id.*; *see also, White, supra*, at 1226-27. Review by this Court is necessary to correct this error, reconcile the instant opinion herein with prior precedent, and delineate the scope of the interference clause of the FHA.

B. The Ninth Circuit's Finding That Advocacy That Is Absolutely Protected Under The First Amendment Can Violate The FHA Is Inconsistent With First Amendment Principles And Jurisprudence

The circuit court described the issue in this case as follows:

> "This case presents the question of whether an independent fair housing service provider engaged in advocacy efforts may sue the City with whom it contracts for retaliating against the provider in response to that advocacy."

Walker, supra, at 1120.

The Ninth Circuit held that the fair housing provider in question here, FHF, *could* state such a claim under the state and federal fair housing acts, but *could not* state such a claim under the

First Amendment because the City's acts were absolutely protected by the First Amendment. The holding that conduct protected by the First Amendment can somehow violate the FHA is inherently nonsensical and in direct conflict with the entire body of First Amendment jurisprudence.

In *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) and *Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980), this Court held that government agencies have a First Amendment right to terminate their relationships with employees who hold "confidential" or "policymaking" positions because of the need to place trusted and loyal individuals in such positions. The "*Elrod-Branti* rule" has been uniformly and routinely followed by the circuit courts. *See, e.g., Walker, supra,* at 1131-32. In *Board of County Commissioners v. Umbehr*, 518 U.S. 668, 116 S.Ct. 2342, 135 L.Ed.2d 843 (1996), this Court extended the First Amendment principles applicable to public employees to independent government contractors.

In reliance on these decisions, the Ninth Circuit, in *Biggs v. Best, Best & Kreiger*, 189 F.3d 989 (9th Cir. 1999), held that government officials have an absolute First Amendment right to terminate contractors who hold confidential or policymaking positions, because of their need to place individuals they trust in sensitive and/or advisory positions.

The Seventh Circuit arrived at the same result in *Pleva v. Norquist*, 195 F.3d 905 (7th Cir. 1999). The court reiterated the well-established principle that government officials have both a First Amendment right and a legitimate interest in implementing their policies by associating with individuals and entities who are not disloyal, and found that such officials *must* do so in order to "seize the reigns of government and realize their electoral mandate." *Id.* at 911-912. Moreover, the court recognized that the First Amendment associational right to retain parties who are ideologically aligned applies, not just to First Amendment claims, but to other claims as well, opining that "where policymaking

positions are concerned it is wholly legitimate for a government official to use his discretionary appointment power to reward his friends and keep his political, or personal, opponents at a distance." *Id.* at 917. Accordingly, the court concluded that a terminated employee's status as a policymaker defeated not only his First Amendment claim, but his substantive due process, equal protection and age discrimination claims as well.[3]

The Ninth Circuit's opinion in this case is inconsistent with *Biggs* and *Pleva*, as well as the entire body of law recognizing the government's right to terminate policymaking officials. These decisions recognize that the First Amendment *right* to associate with ideologically loyal policymakers "trumps" other rights, including the policymaker's right to retain his or her position, and that to hold otherwise would compromise the effective operation of government. This is true whether a claim is brought under the First Amendment or some other statutory or constitutional provision. It simply makes no sense to find that the government has an absolute First Amendment right to terminate a policymaker for advocacy under the First Amendment, but no corresponding right under the FHA or another statute. The Ninth Circuit's holding to this effect creates a situation where conduct specifically protected under the First Amendment - - conduct which, if interfered with, would give the City a cause of action under the First Amendment - - could nonetheless subject the City to liability under the FHA. *White, supra* (plaintiffs permitted to seek redress under the First Amendment for HUD's efforts to use the FHA to halt plaintiffs' opposition to housing for the disabled). In other words, whereas prior cases establish that the City could assert a

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[3] The age discrimination claim was brought under the Age Discrimination in Employment Act, which contains an exemption for policymakers. However, with respect to the other two claims (substantive due process and equal protection), the court applied the policymaker exception created under the First Amendment.

First Amendment claim against FHF if FHF attempted to use the FHA to curtail the City's First Amendment activity, under the instant decision, FHF has a reciprocal right to sue the City for "interference" under § 3617 of the FHA. Such an outcome is plainly unworkable and nonsensical.

In addition to this fatal defect, the Ninth Circuit's opinion herein is inconsistent with prior precedent for two additional reasons.

First, the court cited to First Amendment authority in determining that FHF could seek redress for the non-renewal of its contract because the instant case was akin to a "failure to hire case." *Walker, supra,* at 1126, citing *Mt. Healthy School District v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). In so holding, the Court essentially recognized a right of action based on the First Amendment, without giving the City the benefit of the defenses (specifically the policymaker defense) applicable in First Amendment cases.

Second, the Ninth Circuit's refusal to limit or apply a "rule of reason" to the interference clause of the FHA in light of FHF's policymaking status is inconsistent with cases decided under other anti-discrimination statutes. Specifically, the instant opinion is contrary to cases decided under Title VII of the Civil Rights Act -- decisions on which the courts routinely rely to interpret the FHA (which is contained in Title VIII of that Act). *See, e.g., Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 935 (2d Cir. 1988), *aff'd per curium,* 488 U.S. 15 (1988). These cases recognize that a confidential or policymaking employee's opposition to an employer's allegedly discriminatory conduct is not protected by the anti-discrimination statutes if it creates a conflict of interest, undermines the employee's effectiveness, or disrupts the relationship of trust and confidence between the parties. *See, e.g., Hochstadt v. Worcester Foundation for Experimental Biology*, 545 F.2d 222 (1st Cir. 1976) (employee's hostile and disruptive expression of opposition to employer's

allegedly discriminatory practices not protected under Title VII); *Rosser v. Laborer's Int'l. Union*, 616 F.2d 221, 223 (5th Cir. 1980), *cert. denied*, 449 U.S. 886 (1980) (employee's attempt to oust boss in response to alleged discrimination held unprotected); *Jones v. Flagship Int'l.*, 793 F.2d 714 (5th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987) (employer permitted to terminate equal employment opportunity manager who filed claim against employer and encouraged other employees to do so, given manager's role in handling such claims); *Smith v. Singer Co.*, 650 F.2d 214 (9th Cir. 1981) (by filing discrimination charges against employer, equal opportunity officer rendered himself unable to perform job functions, thereby justifying his termination).

In the present case, FHF, among other things: (1) covertly entered into a "paralegal" relationship with, and provided confidential information to, the attorney suing the City at the same time it was under contract to the City; (2) failed and refused to provide the City with this same information, even though it was contractually obligated to do so; and (3) unsuccessfully attempted to file a frivolous lawsuit against the City based on the conduct of county law enforcement officers whose conduct was not attributable to the City. The Ninth Circuit's suggestion that these acts are protected by the FHA, and its refusal to place any limits on FHF's conduct in light of its confidential and policymaking position, completely ignores this authority and the City's well-established right and need to have trust and confidence in FHF given this position.

C. The Circuit Court's Decision Nullifies The Limitations Imposed By The Housing And Community Development Act

The Ninth Circuit also opined that the City's decision to use the funds allocated by HUD to hire another fair housing provider to replace FHF was actionable under the FHA, because it prevented FHF from working in Lakewood. The court so held even though the Housing and Community Development Act, 42

U.S.C. § 5301 *et. seq.* ("HCDA") specifically provides that there is no private right of action to challenge the use of funds received from HUD, concluding that a contrary holding would repeal the FHA by implication. *Walker, supra*, at 1127.

The Ninth Circuit's determination that acknowledging the HCDA will repeal the FHA is not well founded because of the unique situation presented here, *i.e.*, the fact that this is a dispute over money, not a dispute over government conduct which itself impedes fair housing services or rights. Contrary to the court's suggestion, the City's actions did not "altogether [prevent FHF] from working in Lakewood." *Id.* at 1129. The City merely decided not to use the funds it received from HUD to *pay FHF* to do so.[4] In other words, FHF seeks to compel the City to engage in *affirmative* conduct to promote housing (by retaining FHF instead of some other fair housing service provider), rather than to refrain from conduct which negatively impacts housing or housing rights.

Put simply, there is no other published FHA decision which involves a lawsuit by a service provider retained with HUD funds to affirmatively compel a government entity to continue to use those proceeds to pay it, rather than another service provider. This is not surprising, and such lawsuits should properly be governed by the HCDA since they *a fortiori* involve the distribution and disbursement of HUD funds. Accordingly, it is entirely appropriate and consistent to adjudicate suits which do *not* involve the distribution of HUD funds (*i.e.*, disputes over government actions which themselves impede the provision of housing or housing services) under the FHA, and suits which *do* involve the distribution of such funds (*i.e.*, lawsuits to affirmatively compel the government to spend money in a

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[4] This case is thus unlike other cases where the government's actions (generally, discriminatory zoning and planning decisions) directly affect housing opportunities or services.

particular fashion) under the HCDA.

In fact, prior to the Ninth Circuit's decision, this was the state of the law. The court's holding to the contrary effectively nullifies the limitations imposed by the HCDA - - limitations which were specifically implemented to ensure that HUD funds were spent to provide housing, rather than to fight litigation brought by parties who felt they should receive such funds. *Nabke v. U.S. Dept. of Housing and Urban Development*, 520 F.Supp. 5, 9 (W.D. Mich. 1981).

In short, requiring FHF to pursue its remedies under the HCDA would recognize the unique circumstances presented here, and would avoid the problematic situation that will arise if every fair housing provider whose contract is not renewed has an automatic right to sue under the FHA (which, as explained above, will necessarily result because under the Ninth Circuit's opinion any effect on the contractor's provision of housing services will *a fortiori* constitute "interference" or "meddling" with the provider's activities in violation of § 3617). In addition to being inherently illogical, such an outcome will create adversarial contractual relationships, encourage litigation, and give housing providers a vested right to perpetual renewal of their contracts (or a *prima facie* cause of action if a city declines to renew a contract at its peril). This will not only imbue housing service providers with extraordinary rights not possessed by any other government contractor, but will violate congressional intent by diverting HUD funds to dispute-resolution efforts.

CONCLUSION

For the foregoing reasons, the City of Lakewood respectfully requests that this Court grant its Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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(Any footnotes trail end of each document)
272 F.3d 1114 (9th Cir. 2001)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NELSON WALKER,
Plaintiff,

and

FAIR HOUSING FOUNDATION OF LONG BEACH,
Counter-claimant-Appellant,

v.

CITY OF LAKEWOOD, a California Municipality,
Defendant-Appellee.

No. 00-55060

Argued and submitted July 10, 2001
Filed Aug. 31, 2001
Amended Nov. 1, 2001

COUNSEL:
For FAIR HOUSING FOUNDATION OF LONG BEACH, Counter-claimant - Appellant: Barrett S. Litt, Esq., LITT AND MARQUEZ, Los Angeles, CA.

For CITY OF LAKEWOOD, Defendant - Appellee: Kristin A. Pelletier, and Richard R. Terzian, BANNAN, GREEN, FRANK & TERZIAN, LLP, Los Angeles, CA.

For CITY OF BURBANK, Amicus: Krista Macnevin Jee, Esq., LAW OFFICE OF RICHARD D. JONES, Fullerton, CA.

JUDGES:
Before: John T. Noonan, Barry G. Silverman, and Richard A. Paez, Circuit Judges.

ORDER DENYING PETITION FOR REHEARING/AMENDING OPINION

PAEZ, Circuit Judge:

ORDER:

The panel has voted unanimously to deny Defendant and Appellee City of Lakewood's petition for rehearing. Judges Silverman and Paez have voted to deny the petition for rehearing en banc, and Judge Noonan so recommends.

The full court has been been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing and rehearing en banc is DENIED.

The opinion filed August 31, 2001, is hereby AMENDED as follows:

1. Footnote 4 on page 12030 of the slip opinion is deleted.

2. The two sentences on page 12033 of the slip opinion,

> "The City supervised the organization more closely than it had before, by sending city officials to monthly meetings; asked the FHF to "curtail the amount of exposure" it gave discrimination complaints; and contacted other cities to complain about the FHF. Additionally, the City filed suit against the FHF for breach of contract, which required time and money to defend.", are deleted and replaced with the following two new sentences:
>
> "The City supervised the organization more closely than it had before, by sending city officials to monthly meetings, and also asked the FHF to 'curtail the amount of exposure' it gave discrimination complaints.

> Additionally, the City contacted other cities to complain about the FHF and also filed suit against the FHF for breach of contract, which required time and money to defend.[5]"

3. The following footnote number 5 is added at the end of the second new sentence:

"[5] The City's right to engage in these types of activities may be protected under the Noerr-Pennington doctrine, named after the two Supreme Court cases, *Eastern Railroad Presidents Conference v. Noerr Motor Freight, 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961)*, and *United Mine Workers of America v. Pennington, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965)*. The Noerr-Pennington doctrine was originally developed to protect companies who lobbied the government or who sought redress from the courts from liability under the Sherman Act. See, e.g., *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc. 508 U.S. 49, 56, 123 L. Ed. 2d 611, 113 S. Ct. 1920 (1993)* ('Those who petition government for redress are generally immune from anti-trust liability.'). This doctrine has been extended beyond its original context, and may be invoked in at least some limited cases by governmental entities, *Manistee Town Ctr. v. City of Glendale, 227 F.3d 1090, 1094 (9th Cir. 2000)* (holding that city may invoke Noerr-Pennington defense to protect lobbying of county government).

"But even if we were to apply Manistee to the City's alleged conduct in this case, the City's third-party suit against the FHF would not be protected activity under the Noerr-Pennington doctrine if it was 'objectively baseless.' *Prof'l Real Estate Investors, 508 U.S. at 60.* In addition, the City's communications with other cities regarding FHF must constitute 'petitioning' within the meaning of Manistee. *Manistee, 227 F.3d at 1093-94.* It is not clear from this record whether these standards are met and, therefore, whether the City ought to be able to claim a Noerr-Pennington defense with regard to these two types of conduct. Because there are genuine issues of fact regarding

the City's alleged retaliatory conduct, we leave these issues for the district court to resolve on remand. With regard to the other allegedly retaliatory conduct, the doctrine does not apply and the City has no Noerr-Pennington defense."

OPINION:

This case presents the question of when an independent fair housing services provider engaged in advocacy efforts may sue the city with whom it contracts for retaliating against the provider in response to that advocacy. We hold that, as a general matter, retaliation against independent providers can be actionable under the federal Fair Housing Act, *42 U.S.C. § 3617*, and the California Fair Employment and Housing Act, Cal. Gov't Code § 12955.7, and that, in this case, the Fair Housing Foundation of Long Beach's claims should have survived summary judgment. We remand those retaliation claims to the district court for further proceedings. However, we also hold that, under the circumstances in this case, the Fair Housing Foundation cannot state a claim under *42 U.S.C. § 1983* for retaliation against First Amendment activities.

FACTUAL BACKGROUND

Pursuant to its contract with the City of Lakewood ("City"), the Fair Housing Foundation of Long Beach ("FHF") operated a fair housing counseling program for the City. On September 2, 1992, a group of tenants and former tenants of the Park Apartments complex in Lakewood (the "Park Tenants" or "Park Plaintiffs") contacted the FHF, alleging that the Park Apartments management company was engaged in racial discrimination and harassment. After being presented with their various options, the Park Tenants requested referral to a private attorney. The FHF contacted the law firm of Traber, Voorhees & Olgun within a matter of days after first meeting with the Park Tenants. On July 29, 1993, the FHF advised the City that the residents of the Park Apartments were going to file a lawsuit against the owners and managers of the complex and that a press conference was going to be held at the FHF's offices on the following day. The FHF provided the City with a copy of the press

release and a "case narrative," outlining the history of the anticipated litigation. The press release included the following statement by the FHF Executive Director, Barbara (Mowery) Shull, about the alleged discrimination at the Park Apartments:

> This case illustrates why it is critical for apartment owners and managers to receive training in how to provide fair housing. While many of these families had lived for years in this complex without problem, it only took one ignorant and biased manager a few months to uproot and displace at least eight or nine such families and to send the message to yet another generation of young African-Americans that they are still not welcome in middle class cities like Lakewood.

The City contends that this statement accused it of racism.

The Park Tenants filed suit on July 30, 1993. Claiming unlawful eviction, harassment, and other discrimination based on race and familial status, the plaintiffs alleged violations of the federal Fair Housing Act ("FHA"), *42 U.S.C. § § 3601*-3619, 3631; the California Fair Employment and Housing Act ("FEHA"), Gov't Code § § 12955-12956.1; the Unruh Civil Rights Act, Cal. Civil Code § 51, 52(a); and the California Business and Professions Code § 17200; as well as negligent hiring, training, and/or supervision, and intentional infliction of emotional distress. The underlying action was resolved by a consent decree approved by then-District Judge Wardlaw on April 2, 1997.

In the meantime, on August 4, 1993, Scott Barker, Vice President of the Park Apartments' management company and a named defendant in the Park lawsuit, sent a letter to City officials complaining about the lawsuit and the FHF's investigation and aiding of the Tenants. Barker asked the City officials to "please review the policies of the Foundation and ask them to truly investigate claims prior to making statements in the newspaper." The top of the letter had a

handwritten note saying, "We will be responding to this request! – Jack G." Jack Gonsalves is Assistant Director of Community Development for the City. On August 17, 1993, Charles K. Ebner, the City's Director of Community Development, sent a letter to the FHF requesting a meeting to discuss" possible contract violations." Ebner wrote the FHF a second letter, on September 23, 1993:

> We believe FHF exercised poor judgement concerning the press release and conference in The Park apartments case ....The handling of The Park apartments case, and in particular the press conference, leaves us with serious concerns for the future ....Quite frankly we are looking for some assurance on the part of FHF that a similar scenario will not occur in the future and that you will have more regard for the community of Lakewood.

The FHF replied with a letter dated September 26, 1993, in which it informed the City that it was considering joining the Park Tenants suit as a plaintiff and that it was common practice for fair housing organizations to participate in press conferences, and expressed concern because the City's Housing Specialist, Michelle (Mitchell) Ramirez, had told Barbara Shull that the FHF would not be paid until it apologized. In a November 4, 1993, letter Ebner disputed the nature of the conversation between Ramirez and Shull:

> Ms. [Ramirez], in fact, simply informed Ms.[Shull] that the City was waiting for a response from the FHF before releasing payment for those months. The City's interest is in resolving any problems with the FHF and receiving some assurance on the part of FHF that a similar scenario will not occur in the future and that you will have more regard for the community of Lakewood.

The November letter included the back payments that the City owed the FHF.

Then-District Judge Tashima denied the FHF's request to join the underlying action as a co-plaintiff, but granted the Park Tenants' request to join the City and the Los Angeles County Sheriff's Department as defendants.

Although the City had renewed the FHF's contract from 1990 to 1993 without requiring the FHF to submit a new bid each year, the City sent out requests for proposals to various fair housing organizations to replace the FHF. The City did not ask the FHF for a bid. Only the Fair Housing Council of San Bernardino and the FHF, which submitted a bid despite not receiving a request, submitted proposals. The FHF alleges it was excluded from consideration, and the San Bernardino organization was chosen to receive the 1994-95 contract.

The City filed a third-party complaint against the FHF and Shull for breach of contract and indemnity. In response, the FHF filed this counterclaim against the City, alleging interference and retaliation, in violation of the FHA, the FEHA, and the First Amendment. Judge Tashima dismissed the complaint against Shull and the breach of contract claim against the FHF. On May 17, 1999, District Judge Tevrizian granted summary judgment for the FHF on the City's indemnity claim and for the City on the FHF's state and federal fair housing claims. The district court held that the FHF did not have standing to sue under the FHA because the contract between the parties governed the FHF's legal obligations and contemplated termination of the relationship. The district court also held that the FHF did not have standing under the FEHA because that statute does not extend protection to independent contractors. On October 18, 1999, the district court also granted summary judgment for the City on the FHF's First Amendment retaliation claim. The district court held that, because of its confidential and policymaking position, the FHF was not entitled to First Amendment protection. The FHF now appeals. We have jurisdiction under *28 U.S.C. § 1291*. We affirm the summary judgment on the § 1983 claim, but reverse the summary judgment on the FHA and FEHA retaliation claims.

STANDARD OF REVIEW

Standing is a question of law reviewed de novo. *Stewart v. Thorpe Holding Co. Profit Sharing Plan, 207 F.3d 1143, 1149 (9th Cir. 2000); San Pedro Hotel, Inc. v. City of Los Angeles, 159 F.3d 470, 474-74 (9th Cir. 1998).*

A grant of summary judgment is also reviewed de novo. *Botosan v. Paul McNally Realty, 216 F.3d 827, 830 (9th Cir. 2000).* We apply the same standard as the trial court under Federal Rule of Civil Procedure 56(c). We must determine, viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Lopez v. Smith, 203 F.3d 1122, 1131 (9th Cir. 2000)* (en banc).

DISCUSSION

A. STANDING UNDER THE FHA AND FEHA

The Fair Housing Act makes it" unlawful to coerce, intimidate, threaten, or interfere with any person ... on account of his having aided or encouraged any other person in the exercise or enjoyment of [] any right granted or protected by" the Act. *42 U.S.C. § 3617.* The FHF alleges that the City violated § 3617, as well as the analogous state law, the FEHA, Cal. Gov't Code § 12955.7, by retaliating against the organization for its involvement in the Park Tenants' lawsuit.[1]

At the outset, we consider whether the FHF has standing to bring retaliation claims under the FHA and FEHA. Because it meets the minimal requirements of Article III of the Constitution, we hold that it has standing.

1. LEGAL STANDARD

In *Havens Realty Corp. v. Coleman, 455 U.S. 363, 372, 71 L. Ed. 2d 214, 102 S. Ct. 1114 (1982),* the Supreme Court reaffirmed that "'Congress intended standing under [the FHA] to extend to the full limits of Article III' and that courts accordingly lack the authority to create prudential barriers to standing in suits brought under that [statute]." (quoting *Gladstone, Realtors v. Vill. of Bellwood, 441 U.S. 91, 103*

n.9, 109, 60 L. Ed. 2d 66, 99 S. Ct. 1601 (1979)). Accordingly, courts do not have the authority to create and apply new standing requirements, as the district court did here in imposing a "rule of reason" barring FHA suits between parties to a contract. "(The sole requirement for standing to sue under [the FHA] is the Article III minima of injury in fact: that the plaintiff allege that as a result of the defendant's actions he has suffered 'a distinct and palpable injury.'" *Havens Realty, 455 U.S. at 372* (quoting *Warth v. Seldin, 422 U.S. 490, 501 (1975))* (emphasis added). See also *Fair Housing Council of Suburban Phila. v. Montgomery Newspapers, 141 F.3d 71, 75 (3d Cir. 1998)* (holding that "courts ... may not create prudential barriers to standing under the Act" when fair housing services providers sue for retaliation under § 3617).

The Supreme Court has established three requirements for standing under Article III.

> *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992).*
>
> First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent .... Second, there must be a causal connection between the injury and the conduct complained of .... Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Id. at 560-61 (internal quotations and citations omitted). In the context of a summary judgment motion, the plaintiff may not "rest on ... mere allegations, but must set forth by affidavit or other evidence specific facts ...." *504 U.S. at 561* (internal quotations and citations omitted).

In Montgomery Newspapers, the Third Circuit applied these standards to determine the standing of a fair housing organization to bring an FHA retaliation claim. The Fair Housing Council ("Council") had filed suit in district court

alleging that the newspaper company had violated the FHA by publishing discriminatory housing advertisements. In an amended complaint, the organization added allegations that Montgomery had retaliated against the Council as a result of the Council's complaint against Montgomery. The Council "contended that in newspaper articles, testimony before the state legislature, and other false statements ..., the [Council] had been placed in a position of ridicule which impaired the organization's effectiveness." *141 F.3d at 73.* The Third Circuit held that the organization had established an "injury in fact" by showing it had been forced to answer questions posed by a government agency and to defend the basis for its earlier litigation. *141 F.3d at 81.*[2]

2. THE FHF'S STANDING TO BRING AN FHA CLAIM

In this case, the FHF alleged that it "suffered injury in its ability to carry out its purposes ... to eliminate housing discrimination, to resolve fair housing disputes, [and] to find and make available decent housing ...." In particular, the FHF alleged that the City had delayed payments due under the contract, "attempted to interfere with the investigation of fair housing complaints by FHF," failed to renew the FHF contract, filed a retaliatory and frivolous third-party complaint against both the FHF and its Executive Director," and made "negative comments to at least one city administrator from a city other than Lakewood regarding the FHF's performance under its contract so as to attempt to interfere with the FHF's attempt to renew its contract with that city ...."[3]

Because this case is at the summary judgment stage, the FHF must support those allegations with "specific facts." *Lujan, 504 U.S. at 561.* The FHF has met its burden. Viewing the facts in the light most favorable to the FHF, the record shows that the City withheld payment for several months (Letter from Sharon Weissman to Ebner of 9/26/93; Letter from Ebner to Weissman of 11/4/93); replaced the FHF without asking the FHF to submit a new proposal (Decl. of Shull on 5/3/99); called the Housing Manager for the City of Downey to complain about the FHF's performance (id.); and sued the FHF. These actions by the City resulted in direct and

immediate injuries to the FHF. In addition, the FHF alleges that it lost staff time spent responding to the City's retaliation (Dep. of Shull on 4/6/99), and lost several other contracts (Decl. of Shull on 5/3/99). These injuries are, at least, indirectly attributable to the City's actions. Any time, money, or business lost could be directly redressed by a damage award. Accordingly, we conclude that the FHF has standing to sue the City for retaliation under § 3617.

3. THE FHF'S RIGHT TO BRING A CLAIM UNDER THE FEHA

The FHF also brought a claim under the California Fair Employment and Housing Act ("FEHA"), Cal. Gov't Code § 12955.7, which likewise prohibits retaliation against fair housing advocacy. The district court granted summary judgment for the City based on two alternative holdings. First, the court held that the FEHA does not cover independent contractors. Second, the district court held that because the FHF does not have standing under the federal FHA, it likewise does not have standing under the FEHA. We again disagree and conclude that the FHF has standing to sue the City under the state FEHA, as well as the FHA.

Because the California Supreme Court has not addressed this question, our task is to "predict how the highest state court would decide the issue using intermediate appellate court decisions, decisions from other jurisdictions, statutes, treatises, and restatements as guidance." *Nat'l Labor Relations Bd. v. Calkins, 187 F.3d 1080, 1089 (9th Cir. 1999)* (internal citations and quotations omitted). In California's intermediate courts, the question of whether the FEHA protects independent contractors is unsettled. See ,e.g., *Sada v. Robert F. Kennedy Med. Ctr., 56 Cal. App. 4th 138, 144 (1997)* ("We find it unnecessary to decide whether the Act covers independent contractors."). In predicting how the California courts will resolve this issue, we are mindful of the fact that the FEHA covers two rather unrelated areas of discrimination, both employment and housing. And we recognize that an argument that the FEHA would not cover independent contractors bringing suits for employment discrimination because they are not employees would require

a different analysis than we conduct here. But even if the legislature intended to draw a line between independent contractors and employees in the employment discrimination context, there is no logical reason that the FEHA would not protect independent contractors engaged in fair housing advocacy from retaliation. Cf. Bd. of County Comm'rs, Wabaunsee *County v. Umbehr, 518 U.S. 668, 686, 135 L. Ed. 2d 843, 116 S. Ct. 2342 (1996)* ("recognizing the right of independent contractors not to be terminated for exercising their First Amendment rights").

More importantly, looking to our own interpretations of the FEHA, we have already held that even parties who may not bring discrimination claims under the FEHA may bring retaliation claims. See *Strother v. Southern Cal. Permanente Med. Group, 79 F.3d 859, 868 (9th Cir. 1996)* (as amended) ("Even if Strother cannot bring a FEHA discrimination claim, she can still assert a FEHA retaliation claim if she had a 'reasonable' belief that she had a legitimate FEHA claim ....") (emphasis in original); see also *Moyo v. Gomez, 40 F.3d 982, 985 (9th Cir. 1994)* (as amended) ("Regardless of whether the inmates in this case actually qualified as employees, Moyo would be able to state a retaliation claim if he could show that his belief that an unlawful employment practice occurred was 'reasonable.'"). In determining if the FEHA's anti-retaliation provisions cover the FHF, California courts would likely apply the same standards as applied under the federal FHA. See *Sada, 56 Cal. App. 4th at 150 n.6* ("In applying the provisions of the FEHA, California courts often follow decisions construing federal antidiscrimination statutes, as long as those decisions provide appropriate guidance."). Because the FHF can maintain an action under § 3617, we conclude that it also can bring a retaliation claim under the FEHA.

B. SUMMARY JUDGMENT ON THE FHA AND FEHA CLAIMS

Having determined that the FHF has Article III standing and that the FEHA protects independent contractors in the housing discrimination context, we now turn to the questions of whether it has stated a cognizable claim for retaliation

under the FHA and FEHA and, if so, whether those claims survive summary judgment. The answer to both questions is, yes.

1. SCOPE OF § 3617

The mere fact that the parties were subject to a contract that could be canceled by either party at any time does not bar this suit. District courts have repeatedly allowed employees to pursue § 3617 retaliation claims against their employers after they were terminated. In those cases, presumably, the employees were working under employment-at-will contracts that could have been canceled at any time. But the FHA nevertheless prohibits employers from canceling those contracts in retaliation for fair housing advocacy. See, e.g., *Meadows v. Edgewood Mgmt. Co., 432 F. Supp. 334, 335 (W.D. Va. 1977)* (holding that § 3617 "provides a remedy in a situation where a resident manager and maintenance technician are dismissed by their employees because of their aid or encouragement to tenants in asserting their right to fair housing"); *Vercher v. Harrisburg Hous. Auth., 454 F. Supp. 423, 424 (M.D. Pa. 1978); Wilkey v. Pyramid Constr. Co., 619 F. Supp. 1453, 1455 (D. Conn. 1985).* And in *Smith v. Stechel, 510 F.2d 1162 (9th Cir. 1975)*, we held that a § 3617 claim by an apartment manager against the management company, alleging that he was fired for renting to black and Mexican-American tenants, was not barred by the statute of limitations. We did not question whether the claim could proceed despite the contractual relationship between the parties.

The City responds that the contract in this case was not canceled but instead was merely not renewed. No court has yet addressed the question of whether the failure to renew an annual contract may be the basis of an FHA retaliation claim. We conclude that this situation is analogous to the more-familiar situation of a retaliatory failure-to-hire in the Title VII and First Amendment contexts. In *Ruggles v. Cal. Polytechnic State Univ., 797 F.2d 782, 786 (9th Cir. 1986)* (as amended), we held that a former part-time instructor could bring a Title VII retaliation claim if the tenure-track teaching "position for which she applied was eliminated or

not available to her because of her protected activities. "See also Mt. *Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 283-84, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977)* ("Even though he could have been discharged for no reason whatever, ... he may nonetheless establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutionally protected First Amendment freedoms."). Similarly, here, the FHF has alleged that the City refused to consider it for the 1994-95 contract because of its protected activities. As we explain below, there is no reason that the principles established in our other cases should not also apply in the FHA retaliation context.

The cases the City cites in support of its position that the FHF's suit may not survive are distinguishable. As an initial matter, the City argues that the FHF is really contesting how the City chooses to spend the funds it receives from the Department of Housing and Urban Development, a challenge which only the federal government may bring under the Housing and Community Development Act ("HCDA"), *42 U.S.C. § § 5301*-5321, because that statute does not provide for a private right of action. See *Nabke v. U.S. Dep't of Hous. and Urban Dev., 520 F. Supp. 5 (W.D. Mich. 1981)*; see also *Alexander v. Sandoval, 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001)* (holding that federal courts may not create private rights of action in statutes that do not otherwise provide for private suit). However, nothing in HCDA or Nabke suggests that an aggrieved party may not proceed under a statute, such as the FHA, which explicitly provides for a private right of action, *42 U.S.C. § 3613*, if the defendant's use of HCDA funds violates that other statute. Furthermore, because the HCDA was enacted subsequent to the FHA, to hold otherwise would be to work a highly-disfavored repeal by implication. See *Tinoqui-Chalola Council of Kitanemuk and Yowlumne Tejon Indians v. U.S. Dep't of Energy, 232 F.3d 1300, 1306 (9th Cir. 2000)*. Such a repeal would require a clear indication of Congressional intent, and there is no indication that a repeal was intended.

Second, the City contends that it was entitled to respond when the FHF accused the City of racism. See *Frazier v. Rominger, 27 F.3d 828, 834 (2d Cir. 1994)* ("Nowhere in

these sections ... can be found a right to question the potential racial motivations of landlords."). Even if we accept the City's charge, that the FHF did accuse the City of racism in its press release, the FHF engaged in a variety of other activities on behalf of the Park Tenants which are protected against retaliation.

Next, the City contends that it merely engaged in "economic competition" when it hired a new fair housing services provider, action that cannot give rise to a retaliation claim. See *Michigan Protection & Advocacy Serv., Inc. v. Babin, 18 F.3d 337, 348 (6th Cir. 1994)* (holding that "economic competition" does not constitute "interference" under § 3617). In Babin, defendant Florence Hammonds was negotiating to lease a house she owned to an organization that runs group homes for the mentally disabled. The defendant neighbors objected and raised enough money to buy the home from Hammonds. The plaintiffs sued, claiming, inter alia, a violation of § 3617.

The Sixth Circuit's "economic competition" holding is, however, factually distinguishable. That holding applies only to the suit against the neighbors, who were merely competing with the group home for control of the property. The FHF has not sued the party engaged in economic competition in this case, the City's new fair housing services provider. Furthermore, unlike defendant Hammonds, the City did more than seek other bids and award the contract to another party; according to declarations submitted by the FHF, the City actually excluded the FHF from the competition for the 1994-95 contract. The FHF has also presented evidence, which we discuss below, that the City's motivation was retaliatory and not "purely economic." *Id. at 348.*

Lastly, the City suggests that contract law bars the FHF's suit. But because the FHA explicitly preempts any state law "that purports to require or permit any action that would be a discriminatory housing practice under this subchapter," *42 U.S.C. § 3615*, we may not defer to state contract law principles in resolving this case. See also *Larkin v. State of Mich. Dep't of Social Servs., 89 F.3d 285, 289 (6th Cir. 1996)* (discussing FHA preemption).

In sum, the City has not provided a persuasive reason that we should not apply our well-settled principles for retaliation claims to this case. Our straightforward review of the facts reveals that this case is extraordinarily similar to those other retaliation cases and falls within the purview of § 3617. The FHF has alleged that, in response to protected advocacy, the City engaged in a series of actions designed to coerce and intimidate the FHF into changing or ceasing their activities. Therefore, the FHF has stated a cognizable claim under the FHA, and we proceed to determine whether the FHF introduced sufficient evidence to survive summary judgment.

2. SUMMARY JUDGMENT

As with any retaliation claim, we apply the familiar burden-shifting analysis established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, *411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973)*. To establish a prima facie case of retaliation, a plaintiff must show that (1) he engaged in a protected activity; (2) the defendant subjected him to an adverse action; and (3) a causal link exists between the protected activity and the adverse action. See *Steiner v. Showboat Operating Co., 25 F.3d 1459, 1464 (9th Cir. 1994)*. If a plaintiff has presented a prima facie retaliation claim, the burden shifts to the defendant to articulate a legitimate nondiscriminatory reason for its decision. *Id. at 1464-65*. If the defendant articulates such a reason, the plaintiff bears the ultimate burden of demonstrating that the reason was merely a pretext for a discriminatory motive. Id.

The FHF has shown that it participated in a protected activity, "aiding or encouraging," *42 U.S.C. § 3617*, the Park Plaintiffs in the exercise of their fair housing rights. The FHF met with the Park Tenants, presented them with their options, and referred them to an attorney; served in a "paralegal capacity" for the attorney; continued to investigate the Park Apartments, using their usual techniques; issued a press release and conducted a press conference in conjunction with the filing of the lawsuit; and attempted to join the lawsuit as a plaintiff.

Viewing the facts in the light most favorable to the FHF, the organization has also shown that it suffered an adverse

action. In the context of a § 3617 claim, that adverse action must be in the form of "coercion, "intimidation, threats, or interference." *42 U.S.C. § 3617.* FHF has not sought to distinguish among these statutory terms, nor does the statute provide any definition. In determining what those terms mean, "we look first to the plain language of the statute, construing the provisions of the entire law, including its object and policy, to ascertain the intent of Congress." *Northwest Forest Res. Council v. Glickman, 82 F.3d 825, 830 (9th Cir. 1996)* (internal quotation marks and citation omitted). As an initial matter, we observe that § 3617 does not require a showing of force or violence for coercion, interference, intimidation, or threats to give rise to liability. When Congress intended to require such a showing, such as in the FHA's criminal provision, it did so. Compare *42 U.S.C. § 3631* (imposing criminal liability when one "by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure intimidate or interfere with" fair housing rights) with *42 U.S.C. § 3617* (making it 'unlawful to coerce, intimidate, threaten, or interfere with any person' in retaliation for fair housing activity). See also *Babin, 18 F.3d at 347* ("Section 3617 is not limited to those who used some sort of 'potent force or duress' ...."). Turning to the plain meaning of these terms, we see that the City's alleged activities could be characterized as interference, coercion, or threats.[4] "Interference" is "the act of meddling in or hampering an activity or process." Webster's Third New Int'l Dict. 1178 (14th ed. 1961). To "coerce" is "to compel to an act or choice by force, threat, or other pressure." Id. at 439. And, more relevant for this case, "coercion" includes "the application of sanctions or force by a government [usually] accompanied by the suppression of constitutional liberties in order to compel dissenters to conform." Id. Finally, a "threat" is "an expression to inflict evil, injury, or other damage on another. "Id. at 2382.

The Supreme Court has instructed that we are to treat "the language of the [FHA as] broad and inclusive." *Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 209, 34 L. Ed. 2d 415, 93 S. Ct. 364 (1972).* We have previously explained that "interference," in particular, "'has been broadly applied to reach all practices which have the effect of

interfering with the exercise of rights under the federal fair housing laws.'" *United States v. Hayward, 36 F.3d 832, 835 (9th Cir. 1994)* (quoting *Babin, 18 F.3d at 347)* (internal quotation marks omitted). Most of the evidence presented by the FHF demonstrates that the City "interfered," or meddled, with its ability to conduct its fair housing activities. The City supervised the organization more closely than it had before, by sending city officials to monthly meetings, and also asked the FHF to 'curtail the amount of exposure' it gave discrimination complaints. Additionally, the City contacted other cities to complain about the FHF and also filed suit against the FHF for breach of contract, which required time and money to defend.[5] Lastly, the City refused to renew the FHF's contract, which altogether prevented the organization from working in Lakewood.[6] Cf. *California Acrylic Indus. Inc. v. Nat'l Labor Relations Bd., 150 F.3d 1095, 1099 (9th Cir. 1998)* (holding that surveillance can constitute "interference" in violation of the National Labor Relations Act ("NLRA"), which prohibits "interfering with, restraining, or coercing employees in the exercise of the rights guaranteed "by the Act).[7]

The FHF has presented further evidence of the City's conduct that, while certainly interference, might also be considered coercion or threats. The City suggested it would not renew the contract if the FHF did not apologize when Ebner sent a letter stating that "the handling of The Park apartments case, and in particular the press conference, leaves us with serious concerns for the future ...." Cf. *Lear Siegler Inc. v. Nat'l Labor Relations Bd., 890 F.2d 1573,* (10th Cir. 1989) (finding that management violated the NLRA when it told the employees "they would be permanently replaced if they participated in a strike."). Further evidence of coercion is the letter from Ebner stating that payments would be withheld until the organization apologized.

Finally, the FHF has demonstrated the requisite causal link. As detailed above, the City sent its first letter to the FHF less than two weeks after receiving a complaint from the Park Apartments management company. That letter suggested that the City would not renew the FHF's contract without an apology for the Park Apartments investigation and

lawsuit. The City's second letter acknowledges that it withheld payment because it was waiting for that apology and "some assurance on the part of the FHF that a similar scenario will not occur in the future ...."

The City, in turn, has met its burden of articulating a non-retaliatory reason for its actions. It alleges that the FHF was not complying with its contract, by not providing promised outreach activities, making necessary reports to the City, or undertaking pre-litigation conciliation efforts, and by using its office for the press conference.

The FHF's approach to a showing of pretext is two-pronged. First, while admitting it was not providing the City with case narratives, the FHF contests the City's claim that it was in violation of its contract, contending that it always submitted its monthly reports; that it is common practice for fair housing organizations to participate in press conferences; that it was not contractually obligated to report to the City prior to taking action; and that the FHF and the Park Tenants' attorneys attempted to conciliate the claims prior to filing the lawsuit. There is, we conclude, a disputed issue of material fact regarding whether the FHF was in compliance with its contract.

Second, the FHF identifies evidence that it asserts shows its protected activities were the real reason for the City's actions. The City had never before complained about the services the FHF was providing and had always renewed the contract without requesting new bids. The City only began to investigate and interfere with the FHF after receiving a letter from Scott Barker, of the Park Apartments management company, complaining about the lawsuit. In her declaration, Barbara Shull alleges that the City's reaction was not prompted by the alleged accusation of racism but was an attempt to placate Barker and his company. She claims that City Administrator Howard Chambers told her, "You need to understand the relationship between the City of Lakewood and the owners of the Park Apartments ....[Barker] continue[s] to invest millions of dollars in the City of Lakewood. This is no way to reward him for all the help he has given the City." Chambers denies making these

statements. But if Shull's account is true, this would support the FHF's position that the City's motives were retaliatory. We conclude that there is a disputed issue of material fact regarding the City's motivations.

Accordingly, we reverse the summary judgment on the FHA and FEHA[8] claims and remand for further proceedings in accordance with this opinion.

C. SUMMARY JUDGMENT ON THE § 1983 CLAIM

The district court also granted summary judgment for the City on the FHF's *42 U.S.C. § 1983* claim that the City impermissibly retaliated against the FHF for exercising its First Amendment rights. The court found that, under *Biggs v. Best, Best & Krieger, 189 F.3d 989 (9th Cir. 1999)*, the FHF held a confidential and policymaking position. Therefore, the court ruled, "the City could terminate its relationship with FHF for purely political reasons without violating FHF's First Amendment rights ...." We affirm this ruling.

In *Moran v. State of Washington, 147 F.3d 839, 850 (9th Cir. 1998)*, we suggested that it was "most doubtful that the Constitution ever protects the right of a public employee in a policymaking position to criticize her employer's policies or programs simply because she does not share her employer's legislative or administrative vision." A year later, in Biggs, relying on *Elrod v. Burns, 427 U.S. 347, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976)*, and *Branti v. Finkel, 445 U.S. 507, 63 L. Ed. 2d 574, 100 S. Ct. 1287 (1980)*, we confirmed that "an employee's status as a policymaking or confidential employee [is] dispositive of any First Amendment retaliation claim." *189 F.3d at 994-95* (citing *Fazio v. City and County of San Francisco, 125 F.3d 1328, 1332 (9th Cir. 1997)*). Therefore, we first ask if the FHF was in a policymaking or confidential position. Only if the FHF was not in such a position do we ask if the FHF's activities were protected under *Pickering v. Board of Educ., 391 U.S. 563, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968)*.

The FHF's initial argument that Biggs should not be applied in this case because of the FHF's status as an independent contractor is unavailing. In Biggs itself, the

plaintiff, an attorney hired to provide legal services for the city, appears to have been an independent contractor hired to provide legal services for the city. The Supreme Court's decisions in Bd. of County Comm'rs, Wabaunsee *County v. Umbehr, 518 U.S. 668, 135 L. Ed. 2d 843, 116 S. Ct. 2342 (1996)*, and *O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712, 135 L. Ed. 2d 874, 116 S. Ct. 2353 (1996)*, applying Pickering to claims by independent contractors, are not to the contrary. In neither case was there evidence presented that the plaintiffs (a waste disposal company and a trucking company, respectively) were in policymaking positions. In Northlake, the Court suggested that the Branti exception for cases in which "the service provider's political 'affiliation is an appropriate requirement for ... effective performance'" would apply to independent contractors as well as employees. *518 U.S. at 724* (quoting *Branti, 445 U.S. at 518)*. Had there been an argument that the plaintiffs in Umbehr and Northlake were in policymaking or confidential positions, the Court certainly would have applied the Elrod-Branti exception. See *Umbehr, 518 U.S. at 677* ("applying our existing framework for government employee cases to independent contractors").

There is a split among the circuits as to whether the policy-maker analysis is a question of law or fact. Compare *Gordon v. County of Rockland, 110 F.3d 886, 888 (2d Cir. 1997)* (question of law), with *Pleva v. Norquist, 195 F.3d 905, 912 (7th Cir. 1999)* (question of fact). We have not yet stated clearly which approach we find to be correct. See, e.g., *DiRuzza v. County of Tehama, 206 F.3d 1304 (9th Cir. 2000)*. In *Elrod, 427 U.S. at 352*, Justice Brennan, delivering the opinion of the court, explained that the determination "whether the politically motivated discharge of employees ... comports with the limitations of the First and Fourteenth Amendments [is] solely a question of constitutional interpretation, a function ultimately the responsibility of this Court." After considering the various approaches, we think the question is best characterized as a mixed question of fact and law.

Determining the particular duties of a position is a factual question, while determining whether those duties ultimately

make that position a policymaking or confidential question is a question of law. As with all mixed questions, we conduct a de novo review. *United States v. City of Spokane, 918 F.2d 84, 86 (9th Cir. 1990).*

This analysis is not intended to be formalistic. In Fazio, we explained that "the essential inquiry is 'not whether the label 'policymaker' or 'confidential' fits a particular position; rather the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.'" *125 F.3d at 1331* (quoting *Branti, 445 U.S. at 518).* In Biggs, we extended this reasoning and explained that the policymaker exception is not to be limited to "party affiliation," but should also include termination based on "political affiliation," which "includes commonality of political purpose and support." *189 F.3d at 996* (citation and internal quotation omitted).

We have set forth nine factors that should be taken into account in this analysis: "whether the [plaintiff] has vague or broad responsibilities, in addition to the [plaintiff's] relative pay, technical competence, power to control others, authority to speak in the name of policymakers, public perception, influence on programs, contact with elected officials, and responsiveness to partisan politics and political leaders." *Biggs, 189 F.3d at 995* (citation and internal quotations omitted). The Supreme Court has advised that we may also consider the purpose of the particular position in question. See *Branti, 445 U.S. at 519* ("It would undermine, rather than promote, the effective performance of an assistant public defender's office to make his tenure dependent on his allegiance to the dominant political party.").

Considering these factors, we conclude that the FHF was in a policymaking position. The FHF's role with regard to the City is closely analogous to that of the zoning board in Pleva, in which "Board members [were] given considerable discretion to implement the broad goals of city zoning policy." *195 F.3d at 913.* The most critical factor is the FHF's influence over City programs: the City had delegated total control over its fair housing program to the FHF. Second, the

FHF had relatively unfettered responsibilities. Although the FHF had a number of specific duties under the contract, its mission was broadly defined, to implement and operate a fair housing counseling program for the City. The FHF had the discretion to determine how best to carry out that mission. Cf. id. (holding that although the zoning board had a number of specific tasks, it also had "broad discretionary policymaking powers"). Third, the FHF was hired particularly for its technical competence in the area of fair housing. Fourth, the public would have perceived the FHF as the City's official fair housing agency. The FHF was also privy to confidential information received from citizens who contacted the organization for counseling and referrals. Because of the FHF's wide-ranging control over the City's fair housing program, we do not consider it significant that the organization had limited contact with elected officials or authority over other city agencies.

Two factors do weigh against finding that the FHF is a policymaker. The contract was clear that the FHF did not have the authority to speak as an agent of the City. However, this factor is outweighed by the fact that the FHF was the sole agency in the City addressing fair housing concerns and the public would have viewed it as having some official authority to speak. More significant is the fact that the FHF's contract specifically contemplated that it would be politically neutral, rather than responsive to partisan politics and political leaders. Nevertheless, while enforcing federal and state fair housing laws is a neutral agenda, the proper way of carrying out that mission, whether through lawsuits or counseling or education, often have political implications. Cf. id. ("One can only assume that individual members will flesh out the meaning of [the board's mandate] with their own policy, and inevitably political, interpretations of what is in the best interest of the public."). In sum, the factors indicating that the FHF was in a policymaking position outweigh those that indicate that it was not.

Having determined that the FHF was in a policymaking position, we must also find, under Biggs, that it cannot proceed with its § 1983 suit. *189 F.3d at 994-95.* We

therefore affirm the district court's summary judgment on the § 1983 claim.

AFFIRMED in part, REVERSED in part, and REMANDED.

Footnotes

[1] The statute defines "person" to include "corporations" and "associations." *42 U.S.C. § 3602*(d). As a non-profit corporation, the FHF is a "person" protected by the statute.

[2] Although both parties discuss our recent decision in *San Pedro Hotel Co. v. City of Los Angeles, 159 F.3d 470 (9th Cir. 1998)*, that case is inapposite. The San Pedro plaintiffs' standing to sue under § 3617 was not at issue in the appeal. *159 F.3d at 476 n.10.*

[3] The FHF also alleges that it has suffered economic injury "in enforcing FHF's rights by way of this counterclaim ...." Several circuit courts have held that standing must be established independent of the lawsuit filed by the plaintiff. See, e.g., *Spann v. Colonial Vill., Inc., 283 U.S. App. D.C. 216, 899 F.2d 24, 27 (D.C. Cir. 1990)* ("An organization cannot, of course, manufacture the injury necessary to maintain a suit from its expenditure of resources on that very suit ...."); *Fair Housing Council of Suburban Phila. v. Montgomery Newspapers, 141 F.3d 71, 80 (3d Cir. 1998)* ("The pursuit of litigation alone cannot constitute an injury sufficient to establish standing under Article III."). Because we agree that a plaintiff cannot establish standing simply by filing its own lawsuit, we will not consider the time and money the FHF has expended in prosecuting this suit in deciding if the FHF has standing to pursue the retaliation claim.

However, the City's breach of contract claim against the FHF may be considered a retaliatory action. See *United States v. Wagner, 940 F. Supp. 972, 978-80 (N.D. Tex. 1996)* (holding that a lawsuit can be a retaliatory action giving rise to a § 3617 claim). Therefore, we do consider the time and money the FHF expended defending itself against

the City's claims, as well as any reputational harm suffered, in deciding if the FHF has alleged an "injury in fact."

[4] "Intimidation" would require a showing that the City's activities had generated fear in the FHF. Webster's Third New Int'l Dict. 1184 (14th ed 1961). There has been no such showing.

[5] The City's right to engage in these types of activities may be protected under the Noerr-Pennington doctrine, named after the two Supreme Court cases, *Eastern Railroad Presidents Conference v. Noerr Motor Freight, 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961)*, and *United Mine Workers of America v. Pennington, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965)*. The Noerr-Pennington doctrine was originally developed to protect companies who lobbied the government or who sought redress from the courts from liability under the Sherman Act. See, e.g., *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc. 508 U.S. 49, 56, 123 L. Ed. 2d 611, 113 S. Ct. 1920 (1993)* ("Those who petition government for redress are generally immune from antitrust liability."). This doctrine has been extended beyond its original context, and may be invoked in at least some limited cases by governmental entities, *Manistee Town Ctr. v. City of Glendale, 227 F.3d 1090, 1094 (9th Cir. 2000)* (holding that city may invoke Noerr-Pennington defense to protect lobbying of county government).

But even if we were to apply Manistee to the City's alleged conduct in this case, the City's third-party suit against the FHF would not be protected activity under the Noerr-Pennington doctrine if it was "objectively baseless." *Prof'l Real Estate Investors, 508 U.S. at 60.* In addition, the City's communications with other cities regarding FHF must constitute "petitioning" within the meaning of Manistee. *Manistee, 227 F.3d at 1093-94.* It is not clear from this record whether these standards are met and, therefore, whether the City ought to be able to claim a Noerr-Pennington defense with regard to these two types of conduct. Because there are genuine issues of fact regarding the City's alleged retaliatory conduct, we leave these issues

for the district court to resolve on remand. With regard to the other allegedly retaliatory conduct, the doctrine does not apply and the City has no Noerr-Pennington defense.

[6] The City suggests that the termination of the contract cannot be an adverse action because FHF was not making a profit on the contract. The adverse action, however, is the "interference" with FHF's activities, not any loss of income. Loss of profit is only relevant at the damages stage. Cf. Bd. of County Comm'rs, Wabaunsee *County v. Umbehr, 518 U.S. 668, 685, 135 L. Ed. 2d 843, 116 S. Ct. 2342 (1996)* ("Evidence of mitigation of his loss by means of his subsequent contracts with the cities [] would be relevant in assessing what remedy is appropriate.").

[7] The similarity of the language of the two statutes is a strong indication that they should be treated in the same manner. See *Bachelder v. Am. W. Airlines, 259 F.3d 1112* (9th Cir. Aug. 8, 2001) (citing *Northcross v. Bd. of Educ. of the Memphis City Schs., 412 U.S. 427, 428, 37 L. Ed. 2d 48, 93 S. Ct. 2201 (1973)).*

[8] Because we apply the same standards to FHA and FEHA claims, *Sada, 56 Cal. App. 4th at 150 n.6*, the McDonnell-Douglas analysis applies to the FEHA claim as well.

CASE NO. CV 93-4531 DT (ANx)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NELSON WALKER, et al.,
Plaintiffs,

vs.

LAKEWOOD CONDOMINIUM OWNERS ASSOCIATION, et al.,
Defendants.

Defendant CITY OF LAKEWOOD,
Third Party Plaintiff,

vs.

FAIR HOUSING FOUNDATION OF LONG BEACH, et al.,
Third Party Defendants.

ORDER GRANTING COUNTER DEFENDANT CITY OF LAKEWOOD'S MOTION FOR SUMMARY JUDGMENT

Background

1. Factual Summary.

The underlying action was brought by individual Plaintiffs Nelson Walker, et al. ("Plaintiffs") against Defendants Lakewood Condominium Owners Association ("Owners Association") , Village Property Management, Inc. ("Village Property"), Scott Barker ("Barker"), Hunter Botts ("Botts"), and Paolo Pedrazzoli ("Pedrazzoli") (collectively, "Private Defendants") , and Defendants the County of Los Angeles (the "County"), the City of Lakewood (the "City"), Borg-Warner Physical Security Corp. ("Borg-Warner"), and

Does 4-500 for damages and declaratory and injunctive relief. This civil action arose under §§ 802, 804, 818 of the Fair Housing Act; 42 U.S.C. §§ 1981, 1982; 42 U.S.C. § 3601 at. seq.; the California Fair Employment and Housing Act (Govt. Code § 12955 at. seq.); the Unruh Civil Rights Act (Cal. Civil Code §§ 51, 52(a)); common law claims of negligent hiring, training and/or supervision; intentional infliction of emotional distress; and unfair business practices under the Business and Professions Code § 17200, at. seq.

Plaintiffs were members of a class who brought an action for themselves and for a class of tenants and former tenants at Park Apartments in Lakewood, California. See First Amended Complaint, ¶ 4. They brought this action on behalf of a class comprised of all African-American tenants. Id., ¶ 14(A). The underlying action was resolved by execution of a Consent Decree which was approved by Judge Wardlaw of this Court on April 2, 1997.

The City is a municipal corporation, organized and existing under the laws of the State of California. See id., ¶20.

Fair Housing Foundation of Long Beach ("FHF") is a nonprofit corporation organized under the laws of California which contracts with the City, and other cities, to provide services to the City based on its expertise in the area of housing discrimination and fair housing counseling services. See id., ¶ 21.

The following facts were deemed undisputed by this Court in its Order Granting In Part and Denying Part Motions for Summary Judgment, dated May 17, 1999:

Pursuant to its contract with the City, FHF investigated and processed housing discrimination complaints voiced by the residents of the Park Apartments in Lakewood, California against the owners and operators of the Contract. See Ex. 1 attached to the Chambers Decl. (Ex. 1 of the Chambers Decl. is hereinafter referred to as "the Contract")

On September 2, 1992, the tenants contacted FHF to investigate their housing discrimination claims. On September 4, 1992, FHF referred the tenants to Traber, Voorhees & Olguin for legal counsel.

On or about July 29, 1993, FHF advised the City that the residents of the Park Apartments were going to file a lawsuit against the owners and operators of the complex, and a press conference was going to be held at FHF's offices on the following day. That same day, FHF provided the City with a copy of the press release and a confidential "case narrative" document, outlining the history of the litigation. The press release contained the following statement by FHF's Executive Director, Barbara Mowery ("Mowery")[1] about the alleged discrimination by the managers of the Park Apartments against African-Americans:

> This case illustrates why it is critical for apartment owners and managers to receive training in how to provide fair housing. While many of these families had lived for years in this complex without problem, it only took one ignorant and biased manager a few months to uproot and displace at least eight or nine such families and to send the message to yet another generation of young African-Americans that they are still not welcome in middle class cities like Lakewood.

On July 30, 1993, African-American tenants of the Park Apartments (the "tenants") filed an action in this United States District Court, case no. CV 93-4531, alleging housing discrimination (the "underlying action").

After being notified of the underlying action, the City complained that FHF declined to provide regular activity reports to the City proceeding the July 30, 1993 press conference as required by the Contract. The City requested

an apology by Mowery for her statement in the press conference, and withheld payments due to FHF for its services under the Contract for July through September of 1993. In November of 1993, the City paid FHF for the unpaid services.

On or about March 1, 1994, FHF advised the City that it was going to attempt to join the underlying action as a co-plaintiff, and that the City would be joined as a defendant in the underlying action.

The Honorable A. Wallace Tashima of this United States District Court denied FHF's request to loin the underlying action as a co-plaintiff, but granted the tenants' request to join the City and the Sheriff's Department as named defendants.

The City claims that it was joined as a defendant in the underlying action after Sheriff's Deputy Armando Rea ("Rea") of the Los Angeles County Sheriff's Department, which provides law enforcement services to the City pursuant to a separate contract, made alleged statements that the City had instructed the Sheriff's Department to engage in racially discriminatory law enforcement activities.

The City sent out requests for proposals to various fair housing providers to replace FHF as the City's fair housing services provider. Only the Fair Housing Council of San Bernardino responded to the City's request. FHF was not invited to submit a proposal, but did so anyway. Fair Housing Council of San Bernardino was selected to provide fair housing to the City beginning in July of 1994.

The City notified FHF of its selection of the Fair Housing Council of San Bernardino on June 9, 1994, and then filed a third party complaint against FHF and Mowery for breach of contract and indemnity. In response, FHF filed a counter claim against the City, alleging that the City had interfered in the tenants' case and had retaliated against FHF for assisting the tenants.

FHF's Section 1983 retaliation claim against the City is the only remaining claim in this action. It is the object of the City's motion for summary judgment presently before this Court.

The following facts are not disputed between the City and FHF:

On September 11, 1990, the City of Lakewood (the "City") entered into a housing services contract with the Fair Housing Foundation of Long Beach ("FHF"), a non-profit corporation. Baa Declaration of Howard Chambers ("Chamber Decl."), ¶ 2.

The Contract was for a one-year term, and was renewed three times, with the last agreement being signed on June 8, 1993. Sea the Contract, ¶ 2. The Contract provided that the agreement could be canceled by either party upon 30 days written notice. Lea the Contract, ¶ 17.

The Contract was signed by the mayor and entered into by the City Council. Lee the Contract; sea also Declaration of Charles Ebner ("Ebner Decl."), ¶ 4.

The monies used to pay FHF under the contracts came from the Community Development Block Grant ("CDBG") funds received from the United States Department of Housing and Urban Development ("HUD") . See the Contract, ¶ 6.

In order to receive CDBG funds from HUD, the City was and is required by HUD to "affirmatively further the policies of the Fair Housing Act." See Ebner fled., ¶ 2; sea also, 24 C.F.R. § 570.601 (stating that a recipient of CDBG funds must administer all programs and activities related to housing and community development in a manner to "affirmatively further the policies of Fair Housing Act.")

The City meets its obligation to affirmatively further fair housing by providing a fair housing counseling and

services program which supplies outreach and educational services and handles and investigates complaints of housing discrimination. See Ebner Decl., ¶ 2.

From September of 1990 to June of 1994, FHF was the City's fair housing service provider. See Contract, ¶ 7; see also, Ebner Decl., ¶ 4.

FHF proposed the activities that it would perform under its contract with the City. See Deposition of Barbara Shull ("Shull Depo."), Ex. 1 to the Declaration of Richard R. Terzian ("Terzian Decl."), at 383:5-384:18.

The responsibility for complying with HUD regulations is placed on the City, and it is accountable to HUD should its fair housing program be deemed deficient. See. 24 C.F.R. § 570.501(a) (stating that a recipient of CDBG funds is responsible for ensuring compliance with program requirements and employment of subcontractor does not relieve recipient of responsibility) see also, 24 C.F.R. § 85.40 (a) (stating that a recipient of CDBG funds must monitor grant-supported activities to assure compliance with applicable federal requirements and to ensure that performance goals are being achieved)

FHF is also accountable under the Federal oversight scheme. See 24 C.F.R. 570.501(a) ("a public agency so designated shall be subject to the same requirements as are applicable to the subrecipients.")

The contracts between FHF and the City state that:

(1) The City desires assistance in providing its citizens with fair housing services;

(2) FHF has "substantial expertise in dealing with all facets of housing discrimination and fair housing counseling services";

(3) FHF "desires to implement and operate a fair housing counseling program desired by City";

(4) FHF would "implement and operate a fair housing counseling program for City and its citizens," in accordance with an agreed-upon Work Plan, and would "employ trained personnel" to do so. See Contract, p.1.

FHF's contracts with the City provided that FHF was an independent contractor, such that the City would have no control over the conduct of FHF's activities or employees, and FHF would retain the right to hire and fire employees as it deemed fit. See Contract, ¶¶ 10, 12.

The Work Plan in the contract required FHF to:

1. (a) Function as a central source for fair housing information and education;

(b) Investigate and conciliate housing discrimination complaints; and

(c) make referrals to appropriate sources for the formal resolution of discrimination complaints when informal conciliation efforts fail. See Work Plan, ¶ 2.

2. Implement a fair housing counseling program, by, among other things:

(a) preparing a public education publication outlining the objectives and services of the Fair Housing Program to be placed in City Hall and distributed to the community;

(b) preparing and distributing news releases informing the community of the Fair Housing Program's purposes, events and services, including 48 public service announcements and two radio spots;

(c) producing a cable access video;

(d)-(e) participating in four speaking engagements and two educational workshops describing the Fair Housing Program's goals and services;

(f)(g)(h) hosting a poster contest and open house; and

(i) accepting and assisting City residents in processing complaints of housing discrimination. See Work Plan, ¶¶ 3(a)-(i)

3. Document, investigate and review complaints received and provide to the City the results of such tests and any recommendations for corrective action deemed necessary by FHF. See Work Plan, ¶ 3(j).

4. Provide information on landlord-tenant rights and placement and referral assistance to low and moderate income housing consumers. See Work Plan, ¶ 3(l)

5. Submit the following reports:

(a) monthly reports for the City Council's consideration providing a detailed summary of discrimination complaints, counseling activities and

other activities;

(b) quarterly reports providing a detailed summary of outreach activities; and

(c) a cumulative year-end report. See. Work Plan, ¶ 3(m)

The Annual Report submitted by FHF for fiscal year 1992-1993 states that:

(1) FHF's purpose under the contract is to "affirmatively further fair housing through a program of information, education, counseling and investigative services designed to promote fair housing";

(2) FHF achieved this result through "innovative programs to eliminate housing discrimination, testing and investigation of discrimination complaints, audits of housing practices, education and outreach services, landlord and tenant counseling, screening and referral services, tester and volunteer training, and promoting media interest in eliminating housing violations;

(3) FHF had knowledge and expertise in fair housing issues, laws, regulations and court decisions; and

(4) FHF provided a "comprehensive" and "extensive" outreach and education program. See 1992-93 Annual Report, Ex. 2 to the Chambers Decl., at pages 3, 4, 6, 15-16.

FHF processed discrimination complaints and obtained information from City residents who were alleged victims of discrimination, including the name, address and phone number of the victim, the alleged perpetrator, and the

location of the alleged discrimination. See Shull Depo., at 79:9-17, 104:6-106:1.

FHF investigated discrimination cases and prepared "case narratives" summarizing the results of its investigation. See Shull Depo., at 105:3-16, 109:2-24.

FHF's executive director described the case narratives as "confidential information we share with cities," but which could not be disclosed to third parties. Shull Depo., at 79:21-25, 172:3-6, 173:8-18.

The case narratives did not include names, addresses or phone numbers because FHF took the position that such information was confidential, even as to the City. See Shull Depo., at 77:18-78:4, 79:15-25, 171:11-25, 326:13-327:10, 406:15-21, 408:9-12.

On September 2, 1992, FHF received complaints of discrimination from certain residents of the Park apartments. [Sea Order Granting in Part and Denying in Part Counter-Defendant City of Lakewood's Motion for Summary Judgment, at 3:13-16; see also Shull Decl., ¶ 10.

In early September, 1992, FHF referred the complainants to the law firm of Traber & Vorhees ("T&V") . See id.; see also Shull Depo., at 223:16-21; Vorhees Depo., at 55:13-56:20.

FHF agreed to assist the tenants through their counsel, TEN. See Shull Depo., at 223:16-225:16; sea also, Vorhees Depo., at 51:5-53:17, 54:10-55:8, 72:1-4.

FHF entered into an attorney-client relationship with TEN. See Shull Depo., at 417:1-13; also Voorhees Depo., at 91:3-10.

FHF exchanged confidential information with T&V which it withheld from the City on confidentiality grounds, and which it objected to providing in discovery on the

grounds of attorney-client work-product privilege. See Shull Depo., at 225:8-16; see also, Voorhees Depo., at 51:5-53:17, 54:10-55:8, 78:23-80:15.

2. Procedural Background.

Plaintiffs originally filed this action on July 30, 1993 against the Private Defendants, alleging that the Private Defendants engaged in an ongoing conspiracy to violate the rights of Plaintiffs and a putative class to be free from unlawful housing discrimination in violation of federal and California law, to retaliate against those who opposed their discriminatory practices, and to conceal their unlawful practices.

On or about February 25, 1994, Plaintiffs filed a Motion to Amend and Supplement Complaint.

On April 11, 1994, United States District Judge Tashima signed the Private Defendants and Plaintiffs' first Stipulation to Continue Litigation Schedule, Stay Depositions Pending the Court's Ruling on Plaintiffs' Motion to Amend and Supplement Complaint, and Order Thereon.

On or about April 26, 1994, Judge Tashima granted in part and denied in part Plaintiffs' Motion to Amend and Supplement Complaint. Plaintiffs were ordered to redraft and file their proposed First Amended Complaint. The Court lifted its Stay of Discovery.

On May 12, 1994, Plaintiffs filed a First Amended Complaint naming the City, the County's Sheriff's Department, and Burns Security as additional Defendants.

On June 20, 1994, the City filed a Third Party Complaint against FHF and Mowery for Breach of Contract and Indemnity.

On August 8, 1994, FHF and Mowery filed a Third Party Counter claim against the City for Damages and Declaratory and Injunctive Relief. FHF alleged violations of

(1) § 818 of the Fair Housing Act, (2) 42 U.S.C. § 1983, and (3) the California Fair Employment and Housing Act, Cal. Govt. Code § 12955 at seq. On the same day, FHF and Mowery filed Motions to Dismiss the City's Third Party Complaint for Failure to State a Claim Upon Which Relief May Be Granted.

On September 12, 1994, Mowery's Motion to Dismiss was granted in full. FHF's Motion to Dismiss was granted in part as to the City's first claim for breach of contract, and denied in part as to the City's second claim for Indemnity and Contribution, with 20 days to answer this remaining claim.

On August 7, 1995, the City filed a Motion for Summary Judgment.

On October 5, 1995, Plaintiffs filed a Motion for Class Certification under Rule 23(b) (2) and (3).

On October 12, 1995, the Court granted Private Defendants extensions until October 30, 1995 to file Oppositions to the Motion for Class Certification and granted Plaintiffs until November 6, 1995 to file Reply Briefs.

On October 30, 1995, the Court filed an Order Extending Plaintiffs' time to file Reply Briefs for the Motion for Class Certification until November 20, 1995. The Court also set the hearing on the Motion for Class Certification for December 4, 1995. The Court ordered the parties to arrange a settlement conference before Magistrate Judge Reichmann.

On November 17, 1995, Plaintiffs and Private Defendants met and reached a tentative agreement but left unresolved the wording of the Proposed Consent Decree.

On November 20, 1995, the Court filed an Order to Continue the Briefing Schedule on the Class Certification Motion in order to finalize the wording of a tentative settlement.

On November 29, 1995, a settlement conference between Private Defendants and Plaintiffs was held before

Magistrate Judge Reichmann.

On December 19, 1995, counsel for the putative class and Burns' counsel agreed to settle claims against Burns, to release claims against the City and to the dismiss the County in the event the Court approved the Proposed Consent Decree.

On December 21, 1995, the Court filed an Order to Continue the Litigation Schedule in order to allow for drafting of a Consent Decree and fairness hearing.

Following this Order, Judge Tashima was elevated to the Ninth Circuit and the case was re-assigned to Judge Wardlaw.

On March 11, 1996, the Court filed a Civil Jury Trial Order.

On December 17, 1996, an Order was filed Certifying the Class.

On April 2, 1997, Plaintiffs' Application for Court Approval of the Class Action Settlement and Consent Decree was granted. The Court ordered the Consent Decree filed. Plaintiffs and Private Defendants agreed to settle class damage and fee claims for the sum of $1.6 million and injunctive relief. Plaintiffs also agreed to receive $75,000 from Burns as well as injunctive relief. The Court ordered the appointment of a Special Master to allocate funds to class members. The Court ordered the City's Summary Judgment Motion moot and deemed withdrawn.

On April 14, 1997, Plaintiffs filed a Notice of Dismissal Following Court Approval of Class Settlement. Pursuant to the Court's approval, Plaintiffs dismissed the City and the County with prejudice. The City remains as Counter Defendant to FHF's Section 1983 claim.

On May 5, 1997 the Court ordered a Settlement Conference be set on or before July 31, 1997, between FHF and the City.

On August 29, 1997, the Court ordered FHF and the City tc attend a Settlement Conference on October 3, 1997 because they had not met as of July 31, 1997.

On November 3, 1997, the Court Ordered the dates for the case continued as follows: Discovery cut-off of April 30, 1998; Motion Cut-off of June 8, 1998; Pre-trial conference of July 27, 1998; and Jury Trial set for September 8, 1998.

On November 18, 1997, the Court filed an Order Approving Method of Distributing Claims to Settling Class Members Under the Age of 18.

On April 17, 1998, FHF filed an Ex Parte Application to Continue Litigation Schedule by Six Months to Allow Time to Find I Substitute Counsel and Prepare the Case for Trial. The reasons for withdrawal of counsel were set out in the declaration of FHF's counsel, Mr. Bert Voorhees of Traber, Voorhees & Olguin (the "Voorhees Declaration")

On April 21, 1998, the Court granted the Application and continued the discovery cut-off for six months and stayed discovery for one month.

On August 13, 1998, pursuant to a Stipulation, the Court filed an Order Continuing Litigation Schedule for Two Months to allow more time to find substitute counsel.

On September 11, 1998, this case was reassigned to Judge Tevrizian of this Court due to Judge Wardlaw's elevation to the Ninth Circuit.

On October 8, 1998, this Court denied a Stipulation to Continue Litigation Schedule for Three Months.

On October 13, 1998, this Court held a Status Conference, and set the Discovery Cut-off date of March 31, 1999, Pre-trial Conference of May 3, 1999, and Jury Trial to be held on June 29, 1999.

On November 3, 1998, FHF substituted Barry Litt of Litt & Associates in place of Traber, Voorhees & Olguin.

On November 5, 1998, this Court filed an Order Approving the Immediate Release of Funds Kept in a Blocked Trust Account.

On March 4, 1999, this Court denied the City's Ex Parte Application for an Order to Unseal Document without prejudice, to the bringing of a properly noticed motion with full briefing by the parties.

On March 5, 1999, the City filed a Motion for an Order to Unseal Documents, which was granted by this Court on March 29, 1999.

On May 17, 1999, this Court denied the City's Motion for Summary Judgment on FHF's Section 1983 claim and granted the City's motion for summary judgment on FHF's Section 3617 Fair Housing Claim as well as FHF's FEHA claim pursuant to CAL. Gov'T CODE § 12955.7. The same day, this Court granted FHF's motion for summary judgment on the City's Indemnity Claim and denied FHF and the City's requests for judicial notice.

On September 27, 1999, the City filed the Motion for Summary Judgment on FHF's Section 1983 claims presently before this Court.

Discussion

1. Standard.

A. Motion for Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment is proper only where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. H. CIV. P. 56. The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial. Baa Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). If the moving party satisfies the burden, the party opposing the motion must set forth specific facts showing that there remains a genuine issue for trial. Lee id.; Fed R. Civ. P. 56(e). It may not rely on "mere allegations or denials of the adverse party's pleadings." Fed. R. Civ. P. 56(e)

A non-moving party who bears the burden of proof at trial to an element essential to its case must make a showing sufficient to establish a genuine dispute of fact with respect to the existence of that element of the case or be subject to summary judgment. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) . Such an issue of fact is a genuine issue if it reasonably can be resolved in favor of either party. See Anderson, 477 U.S. at 250-51. The non-movant's burden to demonstrate a genuine issue of material fact increases when the factual context renders her claim implausible. See Matsushita Electrical Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) . Thus, mere disagreement or the bald assertion that a genuine issue of material fact exists, no longer precludes the use of summary judgment. See Harper v. Wallingform, 877 F.2d 728 (9th Cir. 1989) ; California Architectural Building Products, Inc. v. Franciscan Ceramics, Inc., 818 F.2d 1466, 1468 (9th Cir. 1987) , cert. denied, 484 U.S. 1006 (1988).

If the moving party seeks summary judgment on a claim or defense on which it bears the burden of proof at

trial, it must satisfy its burden by showing affirmative, admissible evidence.

Unauthenticated documents cannot be considered on a motion for summary judgment. Hal Roach Studios v. Richard Feiner and Co., 896 F.2d 1542, 1550 (9th Cir. 1990).

On a motion for summary judgment, admissible declarations or affidavits must be based on personal knowledge, must set forth facts that would be admissible evidence at trial, and must show that the declarant or affiant is competent to testify as to the facts at issue. Fed. R. Civ. P. 56(e). Declarations on "information and belief" are inappropriate to demonstrate a genuine issue of fact. Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989)

2. Analysis.

A. Summary Judgment is appropriate as to FHF's claim that the City impermissibly discharged then in retaliation of FHF's exercise of its First Amendment Rights.

1. Biggs v. Best. Best & Krieger, 1999 WL 669064 (9th Cir. (Cal.)), applies to the instant action.

The moving party, the City, argues that the Ninth Circuit's recent holding in Biggs v. Best. Pest & Krieger, 1999 WL 669064 (9th Cir. (Cal.)), (hereafter "Biggs"), applies to the case presently before this Court. This Court agrees.

The primary plaintiff in Biggs was an associate at a private law firm that performed the services of city attorney to the City of Redlands. See Biggs, at *1. Two Redlands city councilmen allegedly threatened to fire the law firm unless the political activities of the primary plaintiff's family were stopped. See id. Eventually, the private law firm fired the associate, who, along with her family, initiated a lawsuit alleging that the council defendants had violated their First

Amendment rights. See id.

The Ninth Circuit acknowledged that there are two lines of Supreme Court cases which apply to different aspects of retaliatory discharge related to the exercise of a government employee's First Amendment rights. On the one hand, there are what the court referred to as the "Branti[v. Finkel, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980),] political patronage (or political affiliation) cases." Id. at *4. In Pranti, the Supreme Court stated that, generally, government employees could not be terminated because of their political associations. Id. However, the Court qualified this rule by allowing an employer to "fire a public employee for purely political reasons if the employer can demonstrate that political considerations are 'appropriate requirement[s] for the effective performance' of the job," because the employee would then occupy a policymaking or confidential position. Id. (quoting Fazio v. City & County of San Francisco, 125 F.3d 1328, 1332 (9th Cir. 1997) (itself quoting Branti, 445 U.S. at 518 (alteration in original))).

On the other hand, the Supreme Court has set forth what the Riggs court referred to as "the Pickering retaliation cases." 1th. Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), and its progeny provide that a government entity may terminate an employee because of protected speech where legitimate countervailing governmental interests exist. Id. at 567-68. This determination is made by balancing "the interest of the (employee] , as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Pickering, 391 U.S. at 568. This balancing test also applies to protect independent contractors from the termination of at-will government contracts in retaliation for their exercise of free speech.[3] See Board of Cty. Com'rs Wabaunsee County,..KS v. Umbehr, 116 S. Ct. 2342, 2346 (1996) . The Umbehr Court explained that the Pickering test may accommodate both the interests of the employee and the independent contractor. Id. at 2349.

FHF argues that the Supreme Court's holding in Umbehr and O'Hare Truck Service, Inc. v. City of Northlake, 518 U.S. 712, 116 S.Ct. 2353, 135 L.Ed.2d 874 (1996), requires this Court to apply the Pickering test despite the Ninth Circuit's holding in Biggs. O'Hare, a companion case to Umbehr, states that "where a government employer takes adverse action on account of an employee or service provider's right of free speech[2]" the Pickering test applies. O'Hare, 116. S.Ct. at 2357-58.

This Court disagrees with FHF's interpretation of Biggs. Relying on its decision in Fazio v. City & County of San Francisco, 125 F.3d 1328 (9th Cir. 1997), the Ninth Circuit held that "an employee's status as a policymaking or confidential employee would be dispositive of any First Amendment retaliation claim." Biggs, at *4 (emphasis added). The Biggs Court went on to explain that "' [a] public employee's claim that he or she was fired for exercising his or her First Amendment speech rights would generally be analyzed using the Pickering balancing test. If, however, a public employee is a policymaker, then the claim would fall under the rubric of . . . Branti.'" Id. (quoting Fazio, 125 F.3d at 1332)

Based on Briggs, before this Court may apply the Pickering test to the facts in this case, this Court must first determine whether FHF occupied a policymaking position. Whether an entity or person is a policymaker is a question of law to be determined by the courts. See Gordon v. County of Rockland, 110 F.3d 886, 888 (2d Cir. 1997); see also, Ness v. Marshall, 660 F.2d 517, 522 (3d Cir. 1981)

If FHF was not a policymaker, then its First Amendment claim would be evaluated using the Pickering balancing test. If FHF was a policymaker, then, according to Branti, its government employment could be terminated for purely political reasons without offending the First Amendment.

b. FHF's duties indicate that it was a policymaker.

The Fazio Court stated that

> [s]ome factors to be considered when determining whether a job is a policymaking position are: "vague or broad responsibilities, relative pay, technical competence, power to control others, authority to speak in the name of policymakers, public perception, influence on programs, contact with elected officials, and responsiveness to partisan politics and political leaders."

Fazio, 125 F.3d at 1334 n.5 (quoting Hall v. Ford, 856 F.2d 255, 262 (D.C.Cir. 1988)).

In addition, the so-called policymaker exception applies when the individual or entity "acts as an adviser or formulates plans for the implementation of broad goals." Elrod v. Burns, 427 U.S. 347, 368, 96 S.Ct. 2673, 2687, 49 L.Ed.2d 547 (1976) . Another factor courts have looked at to determine whether someone is a policymaker is the amount of discretion his or her job entails. See, e.g., Newcomb v. Brennan, 558 F.2d 825, 830 (7th Cir. 1977) (finding that a deputy city attorney is a policymaker because he "functions in a highly discretionary role")

Finally, "'the relevant focus of analysis is the inherent duties of the position in question, not the work actually performed by the person who happens to occupy the office.'" Biggs, at *7 (quoting Collins v. Voinovich, 150 F.3d 575, 577 (6th Cir. 1998)).

FHF claims that its role is ministerial, not discretionary since the federal government, not the City, has the legal authority to set policies in the area of fair housing. According to FHF, the City was nothing more than a conduit through which FHF was to achieve federally mandated policies. Moreover, FHF claims that the City would not have

been held liable for torts committed by FHF since FHF was an independent contractor.

It is unnecessary for this Court to directly address the merits of FHF's argument that the City would not be liable for torts committed by FHF, the argument contradicts the uncontroverted facts laid out above. Specifically, the uncontroverted facts state that the responsibility for complying with HUD regulations is placed on the City and subrecipients, and they are both accountable to HUD should its fair housing program be deemed deficient. See 24 C.F.R. §570.501.

More importantly, upon closer inspection of FHF's duties pursuant to the Contract, this Court finds that FHF is a policymaker for the purposes of Biggs. It is not enough, as City asserts, that because the Contract prohibited the City from interfering with FHF in the performance of its duties, FHF had sufficient discretion so as to qualify as a policymaker. If that were the case, then every independent contractor would qualify as a policymaker for the purposes of First Amendment retaliation cases. The Ninth Circuit certainly could not have intended that to be the result. It is not difficult to conceive of instances when an independent contractor's duties are such as to fall wholly within the category of purely ministerial acts, such as garbage collection.

Rather, the Contract, taken as a whole, demonstrates to this Court that FHF was a policymaker because it had (a) sufficient technical expertise; (b) the authority to speak in the name of policymakers; (c) discretion and control over the implementation of federal policies; and. (d) the public could reasonably perceive the FHF as the policymaker.

First of all, the first page of the Contract recognizes chat FHF has "substantial expertise in dealing with all facets of housing discrimination, and fair housing counseling services."

FHF argues that the federal government, not the City or FHF, sets the policies with regard to fair housing issues. In the absolute broadest sense, that may be the case. However, the Supreme Court rejected a similar argument in Elrod v. Burns, 427 U.S. 347, 368, 96 S. Ct. 2673, 2687, 49 L. Ed. 2d 547 (1975) (finding that the policymaker exception applies when the person "formulates plans for the implementation of broad goals").

Based on the Work Plan in the Contract, FHF had sufficient discretion over the implementation of those broad policies and goals to qualify as a policymaker. For example, Paragraph 2 of the Work Plan, which is uncontroverted between the parties, gives FHF the complete authority and discretion to "investigate and conciliate housing discrimination complaints; and make referrals to appropriate sources for the formal resolution of discrimination complaints when informal conciliation efforts fail."

Most important to this Court's analysis here is the extent to which the Work Plan also included duties that might best be characterized as those of media relations. This is significant with respect to the Fazio factors having to do with public perception as well as the authority to speak on behalf of policymakers. Pursuant to the Work Plan in the Contract, it is uncontroverted that FHF's duties included:

1. (a) function as a central source for fair housing information and education; . .

2. (a) preparing a public education publication outlining the objectives and services of the Fair Housing Program to be placed in City Hall and distributed to the community;

(b) preparing and distributing news releases informing the community of the Fair Housing Program's purposes,

events and services, including 48 public service announcements and two radio spots;

(c) producing a cable access video;

(d)-(e) participating in four speaking engagements and two educational workshops describing the Fair Housing Program's goals and services;

(f)(g)(h) hosting a poster contest and open house; and

(i) accepting and assisting City residents in processing complaints of housing discrimination.

See Work Plan, ¶¶ 2, 3(a) (i) (emphasis added)

These duties lead this Court to conclude that both the City and FHF intended FHF to assume a conspicuous role with respect to fair housing issues in the City. In this respect, it is clear that FHF had the authority to speak on behalf of the City and, most importantly, the public's perception with regard to fair housing issues would not make a distinction between FHF and the City.

Based on the contents of the Work Plan as well as the Supreme Court's decision in Elrod v. Burns, supra, this Court finds that FHF had sufficient discretion and control over the implementation of broad policy objectives as well as substantial authority to speak on behalf of the City so as to qualify FHF as a policymaker for the purposes of Biggs.

Accordingly, the City could terminate FHF for purely political reasons without offending the First Amendment. The City's motion for summary judgment as to FHF's First Amendment retaliation claim is granted.

c. FHF did hold a confidential position.

The City asserts that it could fire FHF even if it did not hold a policymaking position because it "served in a 'position of confidence' or was privy to confidential files or documents." City's Motion for Summary Judgment, p. 15. The City then argues that FHF occupied a confidential position because its duties for the City could have and did give it access to sensitive information which FHF itself characterized as confidential. This Court agrees.

In addition to the policymaking exception, the Fazio Court stated that dismissal of a public employee for purely political reasons is permissible if the employer can demonstrate that political considerations are appropriate given the employee occupies a confidential position. See Fazio, 125 F.3d at 1332. Whether the City could terminate the Contract depends not on whether FHF had access to confidential information of any sort, such as that between people with fair housing complaints and their attorneys, but whether FHF had access to information which was confidential as between FHF and the City.

As indicated earlier, the following facts are undisputed by the parties:

FHF investigated discrimination cases and prepared "case narratives" summarizing the results of its investigation. See Shull Depo., at 105:3-16, 109:2-24.

FHF's executive director described the case narratives as "confidential information we share with cities," but which could not be disclosed to third parties. Shull Depo., at 79:21-25, 172;3-6, 173:8-18.

The case narratives did not include names, addresses or phone numbers because FHF took the position that such information was confidential, even as to the City. See Shull Depo., at 77:18-78:4, 79:15-25, 171:11-25, 326:13-327:10, 406:15-21, 408:9-12.

Based on the preceding undisputed facts, aspects of FHF's relationship with the City clearly involved the communication of confidential information. Therefore, the City could terminate its relationship with FHF for purely political reasons without violating FHF First Amendment rights regardless of whether FHF is a policymaker for the purposes of Biggs.

The City's motion for summary judgment as to FHF First Amendment retaliation claim is granted.

Conclusion

Based on the discussion above, this Court GRANTS Defendant City of Lakewood's Motion for Summary Judgment.

IT IS SO ORDERED.
DATED: OCTOBER 18, 1999

Dickran Tevrizian, Judge
United States District Court

Footnotes

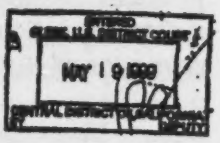
[1]Mowery is now referred to as Barbara Shull.

[2] Any subsequent reference to an individual's duties, actions or rights will implicitly encompass those of an independent contractor.

CASE NO. CV 93-4531 DT (ANx)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NELSON WALKER, et al.,
Plaintiffs,



vs.

LAKEWOOD CONDOMINIUM OWNERS ASSOCIATION, et al.,
Defendants.

Defendant CITY OF LAKEWOOD,
Third Party Plaintiff,

vs.

FAIR HOUSING FOUNDATION OF LONG BEACH, et al.,
Third Party Defendants.

ORDER GRANTING IN PART AND DENYING IN PART COUNTER DEFENDANT CITY OF LAKEWOOD'S MOTION FOR SUMMARY JUDGMENT.

ORDER GRANTING THIRD PARTY DEFENDANT FAIR HOUSING FOUNDATION OF LONG BEACH'S MOTION FOR SUMMARY JUDGMENT ON INDEMNITY CLAIM.

ORDER DENYING FAIR HOUSING FOUNDATION OF LONG BEACH AND CITY OF LAKEWOOD'S REQUESTS FOR JUDICIAL NOTICE.

Background

1. Factual Summary

The underlying action was brought by individual Plaintiffs Nelson Walker, et al. ("Plaintiffs") against Defendants Lakewood Condominium Owners Association ("Owners Association"), Village Property Management, Inc. ("Village Property"), Scott Barker ("Barker"), Hunter Botts ("Botts"), and Paolo Pedrazzoli ("Pedrazzoli") (collectively, "Private Defendants), and Defendants the County of Los Angeles (the "County"), the City of Lakewood (the City"), Borg-Warner Physical Security Corp. ("Borg-Warner"), and Does 4-500 for damages and declaratory and injunctive relief. This civil action arose under §§ 802, 804, 819 of the Fair Housing Act, 42 U.S.C. §§ 1981, 1982; 42 U.S.C. § 3601 at. seq.; the California Fair Employment and Housing Act (Govt. Code 5 12555 at. seq.); the Unrut Civil Rights Act (Cal. Civil Code §5 51, 52 (a)); common law claims of negligent hiring, training and/or supervision; intentional infliction of emotional distress; and unfair business practices under the Business and. Professions Code § 17200, at seq.

Plaintiffs were members of a class who brought this action for themselves and for a class of tenants and former tenants at Park Apartments in Lakewood, California. Lea First Amended Complaint, ¶ 4. Plaintiffs brought this action on behalf of a class comprised of all African-American tenants. Id., ¶ 14 (A). The underlying action was resolved by execution of a Consent Decree which was approved by Judge Wardlaw of this Court on April 2, 1997.

The City is a municipal corporation, organized and existing under the laws of the State of California. See id., ¶ 20.

Fair Housing Foundation of Long Beach ("FHF") is a non-profit corporation organized under the laws of California which contracts with the City, and other cities, to provide services to tha City based on its expertise in the area of housing discrimination and fair housing counseling services.

See id., ¶ 21.

The following facts are undisputed by the parties:

In October of 1990, the City entered into a contract with FHF, wherein FHF agreed to provide City residents with education, counseling and other fair housing services (the "Contract"). The Contract was renewed over the ensuing three years, and the last such Contract expired in June of 1994.

Pursuant to the Contract with the City, FHF investigated and processed housing discrimination complaints voiced by the residents of the Park Apartments in Lakewood, California against the owners and operators of the Contract.

On September 2, 1952, the tenants contacted FHF to investigate their housing discrimination claims. On September 4, 1992, FHF referred the tenants to Traber, Voorhees & Olguin for legal counsel.

On or about July 29, 1993, FHF advised the City that the residents of the Park Apartments were going to file a lawsuit against the owners and operators of the complex, and a press conference was going to be held at FHF's offices on the following day. That same day, FHF provided the City with a copy of the press release and a confidential "case narrative" document, outlining the history of the litigation. The press release contained the following statement by FHF's Executive Director, Barbara Mowery ("Mowery")[1] about the alleged discrimination by the managers of the Park Apartments against African-Americans:

> This case illustrates why it is critical for apartment owners and managers to receive training in how to provide fair housing. While many of these families had lived for years in this complex without problem, it only took one ignorant and biased manager a few months to uproot and displace at least eight or nine

such families and to send the message to yet another generation of young African-Americans that they are still not welcome in middle class cities like Lakewood.

On July 30, 1993, African-American tenants of the Park Apartments (the "tenants") filed an action in this United States District Court, case no. CV 93-4531, alleging housing discrimination (the "underlying action").

After being notified of the underlying action, the City complained that FHF declined to provide regular activity reports to the City proceeding the July 30, 1993 press conference as required by the Contract. The city requested an apology by Mowery for her statement in the press conference, and withheld payments due to FHF for its services under the Contract for July through September of 1993. In November of 1993, the City paid PEP for the unpaid services.

On or about March 1, 1994, FHF advised the City that it was going to attempt to join the underlying action as a co-plaintiff, and that the City would be joined as a defendant in the underlying action.

The Honorable A. Wallace Tashima of this United States District Court denied FHF's request to join the underlying action as a co-plaintiff, but granted the tenants' request to join the City and the Sheriff's Department as named defendants.

The City claims that it was joined as a defendant in the underlying action after Sheriff's Deputy Armando Rea ("Rea") of the Los Angeles County Sheriff's Department, which provides law enforcement services to the City pursuant to a separate contract, made alleged statements that the City had instructed the Sheriff's Department to engage in racially discriminatory law enforcement activities.

The City sent out requests for proposals to various fair housing providers to replace FHF as the City's fair

housing services provider. Only the Fair Housing Council of San Bernardino responded to the City's request. FHF was.not invited to submit a proposal, but did so anyway. Fair Housing Council of San Bernardino was selected to provide fair housing to the City beginning in July of 1994.

The City notified FHF of its selection of the Fair Housing Council of San Bernardino on June 9, 1994, and then filed a third party complaint against FHF and Mowery for breach of contract and indemnity. In response, FHF filed a counter claim against the City, alleging that the City had interfered in the tenants' case and had retaliated against FHF for assisting the tenants.

2. Procedural History.

Plaintiffs originally filed this action on July 30, 1993 against the Private Defendants, alleging that the Private Defendants engaged in an ongoing conspiracy to violate the rights of Plaintiffs and a putative class to be free from unlawful housing discrimination in violation of federal and California law, to retaliate against those who opposed their discriminatory practices, and to conceal their unlawful practices.

On or about February 25, 1994, Plaintiffs filed a Motion to Amend and Supplement Complaint.

On April 11, 1994, United States District Judge Tashima signed the Private Defendants and Plaintiffs' first Stipulation to Continue Litigation Schedule, Stay Depositions Pending the Court's Ruling on Plaintiffs' Motion to Amend and Supplement Complaint, and Order Thereon.

On or about April 26, 1994, Judge Tashima granted in part and denied in part Plaintiffs' Motion to Amend and Supplement Complaint. Plaintiffs were ordered to redraft and file their proposed First Amended Complaint. The Court lifted its Stay of Discovery.

On May 12, 1994, Plaintiffs filed a First Amended Complaint naming the City, the County's Sheriff's Department, and Burns Security as additional Defendants.

On June 20, 1994, the City filed a Third Party Complaint against FHF and Mowery for Breach of Contract and Indemnity.

On August 8, 1994, FHF and Mowery filed a Third Party Counter claim against the City for Damages and Declaratory and Injunctive Relief. FHF alleged violations of (1) § 818 of the Fair Housing Act, (2) 42 U.S.C. § 1983, and (3) the California Fair Employment and Housing Act, Cal. Govt. Code § 12955 et nag. On the same day, FHF and Mowery filed Motions to Dismiss the City's Third Party Complaint for Failure to State a Claim Upon Which Relief May Be Granted.

On September 12, 1994, Mowery's Motion to Dismiss was granted in full. FHF's Motion to Dismiss was granted in part as to the City's first claim for breach of contract, and denied in part as to the City's second claim for Indemnity and Contribution, with 20 days to answer this remaining claim.

On August 7, 1995, the City filed a Motion for Summary Judgment.

On October 5, 1995, Plaintiffs filed a Motion for Class Certification under Rule 23 (b) (2) and (3).

On October 12, 1995, the Court granted Private Defendants extensions until October 30, 1995 to file Oppositions to the Motion for Class Certification and granted Plaintiffs until November 6, 1995 to file Reply Briefs.

On October 30, 1995, the Court filed an Order Extending Plaintiffs' time to file Reply Briefs for the Motion for Class Certification until November 20, 1995. The Court also set the hearing on the Motion for Class Certification for December 4, 1995. The Court ordered the parties to arrange a settlement conference before Magistrate Judge Reichmann.

On November 17, 1995, Plaintiffs and Private Defendants met and reached a tentative agreement but left unresolved the wording of the Proposed Consent Decree.

On November 20, 1995, the Court filed an Order to Continue the Briefing Schedule on the Class Certification Motion in order to finalize the wording of a tentative settlement.

On November 29, 1995, a settlement conference between Private Defendants and Plaintiffs was held before Magistrate Judge Reichmann.

On December 19, 1995, counsel for the putative class and Burns' counsel agreed to settle claims against Burns, to release claims against the City and to the dismiss the County in the event the Court approved the Proposed Consent Decree.

On December 21, 1995, the Court filed an Order to Continue the Litigation Schedule in order to allow for drafting of a Consent Decree and fairness hearing.

Following this Order, Judge Tashima was elevated to the Ninth Circuit and the case was re-assigned to Judge Wardlaw.

On March 11, 1996, the Court filed a Civil Jury Trial Order.

On December 17, 1996, an Order was filed Certifying the Class.

On April 2, 1997, Plaintiffs' Application for Court Approval of the Class Action Settlement and Consent Decree was granted. The Court ordered the Consent Decree filed. Plaintiffs and Private Defendants agreed to settle class damage and fee claims for the sum of $1.6 million and injunctive relief. Plaintiffs also agreed to receive $75,000 from Burns as well as injunctive relief. The Court ordered the

appointment of a Special Master to allocate funds to class members. The Court ordered the City's Summary Judgment Motion moot and deemed withdrawn.

On April 14, 1991, Plaintiffs filed a Notice of Dismissal Following Court Approval of Class Settlement. Pursuant to the Court's approval, Plaintiffs dismissed the City and the County with prejudice. The City remains as Counter Defendant to FHF's claims, and as Third-Party Plaintiff as to its Indemnity Claim against FHF.

On May 5, 1997 the Court ordered a Settlement Conference be set on or before July 31, 1997, between FHF and the City.

On August 29, 1997, the Court ordered FHF and the City to attend a Settlement Conference on October 3, 1997 because they had not met as of July 31, 1997.

On November 3, 1997, the Court Ordered the dates for the case continued as follows: Discovery cut-off of April 30, 1999; Motion Cut-off of June 8, 1993; Pre-trial conference of July 27, 1998; and Jury Trial set for September 8, 1998.

On November 18, 1997, the Court filed an Order Approving Method of Distributing Claims to Settling Class Members Under the Age of 18.

On April 17, 1998, FHF filed an Ex Partr Application to Continue Litigation Schedule by Six Months to Allow Time to Find Substitute Counsel and Prepare the Case for Trial. The reasons for withdrawal of counsel were set out in the declaration of FHF's counsel, Mr. Bert Voorhees of Traber, Voorhees & Olguin (the "Voorhees Declaration").

On April 21, 1999, the Court granted the Application and continued the discovery cut—off for six months and stayed discovery for one month.

On August 13, 1998, pursuant to a Stipulation, the Court filed an Order Continuing Litigation Schedule for Two Months to allow more time to find substitute counsel.

On September 11, 1998, this case was reassigned to Judge Tevrizian of this Court due to Judge Wardlaw's elevation to the Ninth Circuit.

On October 8, 1998, this Court denied a Stipulation to Continue Litigation Schedule for Three Months.

On October 13, 1998, this Court held a Status Conference, and set the Discovery Cut-off date of March 31, 1999, Pre-trial Conference of May 3, 1999, and Jury Trial to be held on June 29, 1999.

On November 3, 1998, FHF substituted Barry Litt of Litt & Associates in place of Traber, Voorhees & Olguin.

On November 5, 1998, this Court filed an Order Approving the Immediate Release of Funds Kept in a Blocked Trust Account.

On March 4, 1999, this Court denied the City's Ex Parte Application for an Order to Unseal Document without prejudice, to the bringing of a properly noticed motion with full briefing by the parties.

On March 5, 1999, the City filed a Motion for an Order to Unseal Document, which was granted by this Court on March 29, 1999.

On April 15, 1999, Third Party Plaintiff and Counter Defendant City of Lakewood filed a Motion for Summary Judgment, or in the Alternative Summary Adjudication, with this Court. Also on April 15, 1999, Third Party Counter Claimant FHF tiled a Motion for Summary Judgment with this Court. Both of these motions are before this Court today.

Discussion

1. Standard.

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment is proper only where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. civ. P. 56. The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). If the moving party satisfies the burden, the party opposing the motion must set forth specific facts showing that there remains a genuine issue for trial. See id.; Fed R. Civ. P. 56(e). It may not rely on "mere allegations or denials of the adverse party's pleadings." Fed. R. Civ. P. 56(e).

A non-moving party who bears the burden of proof at trial to an element essential to its case must make a showing sufficient to establish a genuine dispute of fact with respect to the existence of that element of the case or be subject to summary judgment. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) Such an issue of fact is a genuine issue if it reasonably can be resolved in favor of either party. See Anderson, 477 U.S. at 250-51. The non-movant's burden to demonstrate a genuine issue of material fact increases when the factual context renders her claim implausible. See Matsushita Electrical Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). Thus, mere disagreement or the bald assertion that a genuine issue of material fact exists, no longer precludes the use of summary judgment. See Harper v. Wallingform, 877 P.2d 728 (9th Cir. 1989); California Architectural Building Products, Inc. v. Franciscan Ceramics, Inc., 818 F.2d 1466, 1468 (9th Cir. 1987), cert. denied, 484 U.S. 1006 (1988)

2. Analysis.

A. FHF and the City's Requests For Judicial Notice Are Denied.

Pursuant to Federal Rule of Evidence 201 (d), FHF requests that this Court take judicial notice of the following three documents:

(1) Declaration of Keith Rohman in Support of Plaintiffs' Opposition to Defendant City of Lakewood's Motion for Summary Judgment.

(2) Declaration of Barbara Shull in Support of Plaintiffs' Opposition to Defendant City of Lakewood's Motion for Summary Judgment.

(3) Condensed Deposition of Armando Rea Filed by the City in support of its prior motion for summary judgment.

The City requests that this Court take judicial notice of the following documents:

(1) Declaration of Charles Ebner, Director of Community Development of the City of Lakewood, dated July 25, 1995.

(2) Declaration of Jack R. Gonsalves, Assistant Director of Community Development of. the City of Lakewood, dated July 25, 1995.

(3) Declaration of John Sanford Todd, City Attorney of the City of Lakewood, dated July. 18, 1995.

(4) Plaintiffs' Responses to Interrogatories Propounded by Defendant, City of Lakewood, Set One, dated May 15, 1994.

(5) Plaintiff Margaret Graves' Responses to Interrogatories Propounded by Defendant Village Property Management, Inc. Set One, dated March 25, 1994.

(6) Plaintiff John Graves' Responses to Interrogatories Propounded by Defendant Village Property Management, Inc. Set One, dated March 25, 1994.

(7) Written Deposition of Armando Rea recorded and subscribed by Laura D. Guerrero, CSR, on October 23, 1994.

(8) Written Deposition of Martin Walsh Crump, Sr., Volume I, taken cn April 18, 1995, commencing at 9:20 a.m. at 3764 Orange Avenue, Long Beach, California, by Laura D. Guerrero, CSR.

(9) Volume I of the written deposition of John Graves; Dr., taken on March 30 1995 at 3764 Orange Avenue, Long Beach, California, by Laura D. Cuerrero, CSR.

(10) Defendant Lakewood's Exhibits 3001-3008.

"A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial, court or (2) capable of accurate and ready determination by resort to

sources whose accuracy cannot reasonably be questioned." FRE 201 (b). A court must take judicial notice if a party requests it and supplies the court with the requisite information. FRE 201 (d). All of the aforementioned items appear to have been filed with this Court on a prior motion for summary judgment by the City which was deemed moot as a result of the Consent Decree entered into in the underlying action. While these items may properly be submitted as evidence in connection with the pending motions, these documents are not items of which this Court must take judicial notice. The Court could take judicial notice of the fact that these document were filed with this Court[2]; however this serves no purpose on the matters before this Court today. As such, this Court declines to take judicial notice of the content of the aforementioned items.

B. Summary Judgment in favor of FHF as to the City's Indemnity Claim is warranted[3].

FHF seeks summary judgment in its favor on the City's indemnity claim pursuant to the Contract, which is the only remaining claim under the City's Third Party Complaint[4].

The City seeks indemnity from FHF under the Contract for losses it sustained by being brought in as a defendant in the underlying action. FHF argues that indemnity is not warranted in the present case because, under the contract, FHF has no duty to indemnify the City for liability resulting from the City's own actions. Here, according to FHF, any alleged misconduct was performed by the City, not FHF. This Court agrees with FHF.

Paragraph 11 of the Contract provides:

> FHP shall hold CITY, its Councilman, Commissioners, officers and employees harmless and defend same from and against any and all actions, claims, demands, costs, loss or expenses of any kind or nature whatsoever which may be imposed upon CITY, its Commissioners, officers or employees, or any of

them, arising out of or attributable or connected with the performance of FHF contemplated hereunder.

FHF's Exhibit 5004

First, FHF argues that the City's involvement in the underlying action arose from its own affirmative misconduct. Second, FHF argues that the tenants decision to add the City to the underlying action was independent of FHF's involvement or efforts to join the underlying action as a co-plaintiff.

Indemnity means "an obligation resting on one party to make good a loss or damage another has incurred." E.L. White, Inc. v. City of Huntington Beach (1978) 21 Cal.3d 497, 506. Parties to an express contractual indemnity provision establish a duty of one party to hold another harmless upon the occurrence of specified circumstances. Id. "[T]he extent of that duty must be determined from the contract." Id. at 507. The indemnity provision is strictly construed against the indemnitee. Burlingame Motor Company, Inc. v. Peninsula Activities, Inc. (1971) 15 Cal.App.3d 656, 663. Moreover, "in order to include acts amounting to active or affirmative negligence, the indemnity provision must be clear, positive and specific to that effect." Id. In the absence of sufficiently specific language requiring an indemnitor to held harmless an actively negligent indemnitee, an indemnity provision is "construed to provide indemnity to the indemnitee only if he has been no more than passively negligent." White, 21 Cal. 3d at 507. The contractual language used must be "specifically specific to alert the potential indemnitor to the full scope of its obligation." Bay Development, Ltd. v. Superior Court (1990) 50 Cal.3d 1012, 1033.

FHF insists that the specific language used in paragraph 11, "arising out of or attributable or connected with the performance of FHF contemplated hereunder" means that claims arising out the City's improper conduct are not governed by this provision. FHF argues that the conduct at issue arises out of allegations of housing discrimination

against the City in the underlying action, not out of any action by FHF. FHF points to the fact that this Court previously dismissed the City's breach of contract claim against FHF because the terms of the Contract imposed no rights on the City to control FHF's performance. Even if the City was improperly added as a defendant in the underlying action, FHF contends that the decision to add the City as a named defendant was made by the tenants, not FHF. Because the tenants acted independently of FHF argues that there was no "performance of FHF" which would trigger the indemnification provision. FHF also claims that there was no limitation on FHF in the Contract which prevented it from taking action, or recommending that such action be taken, against the City.

The City counters that triable issues exist as to whether the costs incurred by the City in connection with the underlying action arose out of FHF's performance with its duties under the Contract, and whether the City was guilty of "affirmative misconduct." The City insists that FHF acted as a "quasi-paralegal" for Voorhees, the attorney employed by the tenants in the underlying action," and entered into an attorney—client relationship with Voorhees which conflicted with FHF's contractual relationship with the City under which it is was required to represent the City's interests in providing investigative services. The City insists that FHF attempted to join the City to the underlying action without any basis in law or fact.

First, a construction of the indemnity clause at issue is required. This Court concludes that Paragraph 11 constitutes a "Type III" indemnity clause. "The third type of contractual provision is that which provides that the indemnitor is to indemnify the indemnitee for the indemnitee's liabilities caused by the indemnitor, but which does not provide that the indemnitor is to indemnify the indemnitee for the indemnitee's liabilities that were caused by other than the indemnitor." MacDonald, 29. Cal.App.3d at 420. In the present case, the parties agreed that FHF (the indemnitor) would indemnify the City for liabilities caused by

FHF's performance specified under the Contract. Contrary to the City's suggestion, this clause is not Type II indemnity clause[5]. See id. at 419 (type II clause exists where indemnitor agrees to indemnify indemnitee against liability "howsoever same may be caused" or "regardless of responsibility of negligence" or "arising of use of the premises, facilities or services of indemnitee") The face of the Contract limited the indemnification to liabilities caused by FHF. Therefore Type III indemnity rules govern the Contract.

For Type III indemnity clauses, "any negligence on the part of the indemnitee, either active or passive, will bar indemnification against the indemnitor irrespective of whether the indemnitor may also have been a cause of the indemnitee's liability." MacDonald, 29 Cal.App.3d at 420. "An indemnitor will not be held responsible for more than that to which has obligated himself by contract." Id.

This Court agrees with the City that no showing of misconduct by FHP is required to support an indemnity claim in this case. In Paragraph 11 of the Contract, FHF expressly agreed to indemnify the City for losses connected with the "performance of FHF" under the contract, not losses caused by the City's actions, whether active or passive, or any other party's actions. Strictly construing the Contract against the idemnitee, the City, this Court concludes that the contractual promise in this case extends to losses caused only by FHF's performance under the Contract. Although no finding of negligence has been made against the City in this action or the underlying action, this does not prevent summary adjudication of its indemnity claim. The City's own alleged actions were, at least, one cause of its joinder in the underlying action.

In the Contract, the parties explicitly provided that:

> Neither CITY nor any of its officers or employees shall have any control over the conduct of FHF's activities or the employees of FHF . . . it being distinctly understood that FHF is, and shall at all times remain

> as to CITY, a wholly independent contractor, and FHF's obligations to CITY are solely such as are prescribed by this Agreement.

FHF's Exhibit 5004. While this Court is not convinced that FHF completely satisfied its disclosure obligation to the City before the July 1993 Press Conference, the fact that the City was joined in the underlying action did not arise solely from FHF's contract performance. Because of the standard applied to Type III clauses, this Court need proceed no further. The City also claims that FHF's alleged "quasi-paralegal" relationship with Voorhees violated the terms of the Contract. However the Contract sets forth no explicit limitations upon FHF's interactions with tenants' attorneys. Clearly, it would be unreasonable to assume that an entity responsible for overseeing claims of individual tenants would have no contact with their counsel. Regardless of this issue, the fact remains that the City's joinder in the underlying action was not solely caused by FHF.

Accordingly, FHF's motion for summary judgment on the City's indemnity claim alleged in the Third Party Complaint is granted[6].

C. The City's Motion for Summary Judgment on FHF's Counter Claim is Granted in Part and Denied in Part.

The City seeks summary judgment on FHF's three allegations pled in its counter claim: (1) violation of the Fair Housing Act ("FHA"), 42 U.S.C. § 3601 et seq., (2) violation of the Civil Rights Act of 1871, 42 U.S.C. § 1983, and (3) violation of the California Fair Employment and Housing Act ("FEHA"), § 12955.7. In its counter claim, FHF asserts that the City improperly interfered with FHF's activities in assisting the tenants in the underlying action, and improperly retaliated against FHF by withholding payment due under the Contract, threatening to cancel or not renew the contract, and finally, replacing FHF with another fair housing organization.

1. Summary Judgment as to FHF's Section 1983 Claim is Denied.

FHF's section 1983 claim alleges that the City retaliated against FHF by refusing to renew its contract because FHF attempted to sue the City and join in the underlying action, and because FHF's executive director, Mowery, made a statement at a press conference in connection with the underlying action that the City "sen[t] a message to yet another generation of young African-Americans that they are still not welcome in middle class cities like Lakewood." The City seeks summary judgment in its favor on the Section 1983 claim on the ground that this alleged conduct does not warrant First Amendment protection because FHF's conduct amounts to "disruptive conduct" which bars this First Amendment claim. This Court disagrees that a "disruptive conduct" defense acts as a bar to FHF's section 1983 claim.

The City posits that Pickering v. Board of Education, 392. U.S. 563 (1968), grants the City broad discretion to redress disruptive speech or conduct. Pickering provides that a government entity may terminate an employee because of protected speech were legitimate countervailing governmental interests exist. Id. at 567-68. This determination is made by balancing "the interest of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Pickering, 391 U.S. at 569. This balancing test also applies to protect independent contractors from the termination of at-will government contracts in retaliation for their exercise of free speech. See Board of Cty. Com'rs Wabounsee County, KS v. Urnbehr, 116 8. Ct. 2342, 2346 (1996). The Umbehr Court explained that the Pickering test may accommodate both the interests of the employee and the independent contractor. Id. at 2349.

In Umbehr, two board of county commissioners terminated an at-will trash collection contract between

Umbehr and Wabaunsee County because of Umbehr's open criticism of the County in board meetings and letters and editorials in local newspapers. Id. at 2345. Explaining that the Pickering balancing test was appropriate in this independent contractor situation, the Court pointed to the fact the Boards' interests as a contractor and public service provider "including its interest in being free from intensive judicial supervision of its daily management functions, are potentially implicated." Id. at 2349. Recognizing that the Pickering court required "full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public," the Court in Connick v. Myers, 103 S.Ct. 1684 (1983), stated that the government must be afforded discretion in its management control of others. "[W]e do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." Connick, 103 S.Ct. 1692. It is this disruptions that the City asserts as a bar to FHF's Section 1983 claim.

FHF argues, and this Court agrees, that the disruptive conduct "defense" referred to in Connick is not applicable in the independent contractor context. While Umbehr applies the Pickering balancing test to independent contractor relationships, there is no indication in Umbehr or Connick that the disruptive conduct analysis necessarily extends to independent contractors. Indeed, the premise behind such relationships to remove the day-to-day management obligations which the Umbehr and Connick Courts contemplated in their decisions. The policy concerns of protecting against disruptive speech are not as pervasive in the independent contractor relationship , as in a traditional employment relationship. This Court does not presume to conclude, however, that contractors such as the City in an independent contractor relationship do not have an interest in preventing disruptive conduct which would impair the efficiency of the service being provided. However, this Court opines that even if such a "disruptive conduct" analysis extends to the case at hand, it is not an absolute bar to recovery as the City seems to suggest. Instead, it must factor

into the Pickering balancing test which the City never attempts to undertake in its motion for summary judgment.

In its own analysis, it appears to this Court that a factual issue remains as to whether the Pickering balancing test tips in favor of the City in this instance. Paragraph 10 of the Contract limited the City's daily control over FHF.

> Neither CITY nor any of its officers or employees shall have any control over the conduct of FHF's activities or the employees of FHF and FHF . . . and shall at all times remain as to CITY, a wholly independent contractor, and FHF's obligations to CITY are solely such as are prescribed by this Agreement.

FHF first received complaints from the tenants on September 2, 1992. Sea Decl. of Barbara Shull, ¶ 10. FHF referred the tenants to the firm of Traber & Voorhees on September 4, 1992 and "continued to assist the tenants and their lawyers thereafter." See id. On January 12, 1993, Mowery explained to Jack Gonsalves, Assistant Director of Community Development for the City, "the allegations of the case, the number of complainants, the results of our investigation to date and the fact that the law firm of Traber and Voorhees had been retained by the [tenants]. I also told him that a demand letter was being drafted in hopes of conciliating the matter without having to file a lawsuit." See Decl. of Shull, ¶ 12[7]. On July 29, 1993 Mowery contacted Gonsalves to inform him that a press conference would be held the following day at FHF offices to "announce the filing of the lawsuit." Id. at ¶ 14. It was on this day that Mowery faxed to Gonsalves the press release and a case narrative. See Decl. of Shull, ¶ 15; Exhibits 5022-5023. In the press release, Mowery was quoted as saying:

> This case illustrates why it is critical for apartment owners and managers to receive training in how to provide fair housing. While many of these families had lived for years in this complex without problem, it only took one ignorant and biased manager a few

> months to uproot and displace at least eight or nine such families and to send the message to yet another generation of young African-Americans that they are still not welcome in middle class cities like Lakewood.

Following the press conference, the City began to voice its concerns over FHF's investigation and conciliation efforts in regards to the tenant's complaints. In a letter dated September 26, 1993 from Sharon L. Weissman of FHF to Charles Ebner of the City, Weissman advised that "FHF is seriously considering become a plaintiff in the Park Apartments case." See FHF Exhibit 5057. The City initially refused to pay FHF for its services for the months of July, August and September of 1993, demanding an apology for the "handling of the Park Apartments case and the language of the press release;" however payment was made in November of 1993. See FHF Exhibit 5060. Finally, on June 4, 1994, the City informed FHF that it decided not to renew the Contract for the fiscal year 1994-95. See FHF Exhibit 5059.

The crux of the First Amendment claim is the July 1993 press release. Looking at Mowery's statement in context, as quoted above, it is not clear that the interests of FMF in commenting on the alleged discrimination outweighed the City's interest in efficient FHF services. The Contract did contemplate some reporting requirements to the City of pending cases, and the tenants' allegations had been known to FHF for some ten months prior to the June 1993 press release. See FHF Exhibit 5004, Exhibit A, 3 (m). Triable issues remain as to whether FHF satisfied its obligations to under the Contract to adequately inform the City of the status of the tenants' complaints[8], and of its intent to join the underlying lawsuit. The City also contends that FHF's relationship with Voorhees was improper because he "represented" FHF against the City's interests. While FHF relationship with residents' attorneys does not appear to be contemplated on the face of the Contract, there also remains a factual issue as to what role Voorhees assumed as to FHF.

Accordingly, this Court cannot find, as a matter of law, that FHF's Section 1983 claim is barred because of "disruptive" conduct by FHF. As such, the City's motion for summary judgment as to FHF's Section 1983 counter claim is denied.

2. Summary Judgment in Favor of the City on FHF's Section 3617 Fair Housing Claim is Warranted.

The City contends that because a contractual relationship existed between the City and FHF, FHF's retaliation claim under 42 U.S.C. § 3617 cannot stand. This Court agrees.

Section 3617 prohibits retaliation against those who aid others in exercising rights protected by the Fair Housing Act ("FHA"). Section 3617 of the FHA provides that it is:

> unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606 of this title.

42 U.S.C. § 3617 (emphasis added). The FHA itself applies to municipalities as defendants. See Keith v Volpe, 858 F.2d 467 (9th Cir. 1988)

The City posits that any objections it made to FHF's actions under the Contract cannot rise to "interference" of the right to fair housing under the FHA. FHF counters that a proper Section 3617 claim exists because the Contract was terminated in retaliation for its assistance of the tenants in the underlying action, its attempt to join the underlying action as a co-plaintiff, and its participation in the July 1993 press conference.

FHF urges that its contractual relationship with the City should not foreclose its FHA claim because no authority supports such a conclusion. However, this Court opines that the lack of authority in this area evinces the absurdity of extending the application of Section 3617 to every contract dispute between a city and its own fair housing organization. Instead, this Court agrees with the City's proposition that a "rule of reason" must be followed.

The extent of the City's alleged interference in this case arose directly out of its contractual relationship with FHF. The Contract itself governed FHF's legal obligation to further the fair housing standards:

> The funds provided by CITY pursuant to this Agreement have been received from a grant under the Community Development Block Grant Program of the United States Department of Housing and Urban Development. FHF shall comply with all applicable regulations governing the use of these funds, including all equal opportunity requirements.

FHF Exhibit, 5004. The City's decision to terminate its contractual relationship with FHF was also contemplated in the paragraph 17 of the Contract itself:

> This Agreement may be canceled for cause or for convenience by either Party hereto upon a thirty (30) day written notice to the other Party.

FHF Exhibit, 5004. The City argues, and this Court agrees, that FHF has no standing to pursue a Section 3617 claim against the City. See. e.g., United. States v. Hayward, 36 F.3d 332 (9th Cir. 1994) (United States sued city for FEHA violation in compliance rent control ordinance); Frazier v. Rominger, 27 F.3d 828 (2nd Cir. 1994) (applicants sue landlords for discriminatory renting practices); Michigan Protection Advocacy Service. Inc. v. Babin, 18 F.3d 337 (6th Cir. 1994) (state agency sues vendors and neighbors for discriminatory motives in sale of home). Here, even FHF

acknowledges in its Opposition that its duty to provide fair housing to the community arises out of the "parties' contract." Absent the Contract's existence, there would be no claim for retaliation between the parties. FHF merely agreed to assist the City to "provide its citizens with fair housing counseling services." See FHF Exhibit 5004. FHF points to no contrary evidence that an underlying duty to the Lakewood community exists. Permitting any different interpretation of the statute would result in every failed contractual relationship between a city and its fair housing provider to reach to the FHA for redress. Clearly, this was not the purpose behind the statute.

As such, this Court concludes that FHF's counter claim alleging violation of the FHF is unfounded. This Court grants summary judgment in favor of the City as to FHF's counter claim for violation the FHA.

3. Summary Judgment in Favor of the City on FHF's FEHA Claim is Warranted.

The City argues that summary judgment is proper on FHF's FEHA claim pursuant to California Government Code §12955.7. This Court agrees.

Section 12955.7 provides that it is unlawful to "coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of that person having exercised or enjoyed, or on account of that person having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by Section 12955 or 12955.1." California law seems to suggest that the FEHA does not extend to independent contractors. See Sada v. Robert F. Kennedy Med. Center (1997) 56 Cal.App.4th 138, 158-59 ("Fair Employment and Housing Commission (FEHC), the administrative agency charged with interpreting the [FEHA], has consistently taken the position, through its decisions and regulations, that the Act affords no protection to independent contractors qua independent contractors"). FHF argues that these cases do not address FEHA cases in

the housing discrimination context, however, the Sada court contemplates the independent contractor exception in the retaliation context carved out by the United States Supreme Court in Board of County Commrs. v. Umbehr, discussed above. FHF directs this Court to no contrary authority to suggest that FEHA claims extend to independent contractors in retaliation cases. FHF instead suggests that this Court should follow its conclusions on its FHA claims, because these FEHA claims parallel the alleged retaliation by the City through interfering with FHF because of its assistance of the tenants.

As such, for the reasons discussed in Part B above, this Court grants summary judgment in favor of the City as to FHF's counter claim for violation of Section 12955.7 of the FEHA.

Conclusion

Based on the foregoing discussion, this Court GRANTS FHF's motion for summary judgment on the City's indemnity claim alleged in the Third Party Complaint.

This Court GRANTS IN PART AND DENIES IN PART the City's motion for summary judgment on FHF's Third Party Counter Claims as follows:

1. denies summary judgment as to FHF's Section 1983 counter claim against the City;

2. grants summary judgment in favor of the City as to FHF's counter claim for violation of the FHA; and

3. grants summary judgment in favor of the City as to FHF's counter claim for violation of Section 12955.7 of the FEHA.

IT IS SO ORDERED.
DATED: MAY 17, 1999

Dickran Tevrizian, Judge
United States District Court

Footnotes

[1] Mowery is now referred to as Barbara Shull.

[2] Not all of the documents attached to the judicial notice requests have file stamps, evidencing that they were actually filed with this Court.

[3] The parties make several evidentiary objections to evidence submitted in connection with both motions before this Court. To the extent that this Court relies on objected-to evidence, this Court will address these objections.

[4] The City argues that FHF's motion should be denied because FHF failed to comply with Local Rule 7.4.1. While the parties dispute whether the meet and confer discussion took place on this issue, this Court will proceed on the indemnity issue before it today because this matter has been fully briefed by both parties.

[5] Under a Type II general indemnitee clause, "the indemnitee is indemnified from his own acts of passive negligence, but is not indemnified for his own acts of active negligence that solely or contributorily cause his liability." MacDonald & Kruse. Inc. v. San Jose Steel Co. (1972) 29 Cal.App.3d 413, 419.

[6] FHF also argues that the City's indemnity claim is a Strategic Lawsuit Against Public Participation ("SLAPP Suit"). This argument is unfounded. Pursuant to California Code of Civil Procedure section 425.16, a SLAPP lawsuit must be brought in the form of a special motion to strike, and absent court discretion to the contrary, should be brought within 60 days from service of the complaint.

[7] The City objects to paragraphs 12-15 of the Shull declaration on the grounds of hearsay. This Court agrees as to the first portion wherein Shull refers to a call that Gonsalves received

from a third party press writer. However the hearsay objection as to the above quoted portion is denied because Shull herself is making the statement.

[8] Pursuant to Section 3 (m) of the Work Plan under the Contract, FHF agreed to prepare "[m]onthly reports for City Council's consideration providing a detailed summary of discrimination complaints, counseling activities and other activities of FHF as they relate to the City." See Exhibit 5004, p.9.

No. 00-55060

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NELSON WALKER,
Plaintiff,

and

FAIR HOUSING FOUNDATION OF LONG BEACH,
Counter-claimant-Appellant,

v.

CITY OF LAKEWOOD, a California Municipality,
Defendant-Appellee.

November 1, 2001, Filed

COUNSEL:
For FAIR HOUSING FOUNDATION OF LONG BEACH, Counter-claimant - Appellant: Barrett S. Litt, Esq., LITT AND MARQUEZ, Los Angeles, CA.

For CITY OF LAKEWOOD, Defendant - Appellee: Kristin A. Pelletier, and Richard R. Terzian, BANNAN, GREEN, FRANK & TERZIAN, LLP, Los Angeles, CA.

For CITY OF BURBANK, Amicus: Krista Macnevin Jee, Esq., LAW OFFICE OF RICHARD D. JONES, Fullerton, CA.

JUDGES:
Before: John T. Noonan, Barry G. Silverman, and Richard A. Paez, Circuit Judges.

OPINION:

ORDER DENYING PETITION FOR
REHEARING/AMENDING OPINION

The panel has voted unanimously to deny Defendant and Appellee City of Lakewood's petition for rehearing. Judges Silverman and Paez have voted to deny the petition for rehearing en banc, and Judge Noonan so recommends.

The full court has been been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing and rehearing en banc is DENIED.

The opinion filed August 31, 2001, is hereby AMENDED as follows:

1. Footnote 4 on page 12030 of the slip opinion is deleted.

2. The two sentences on page 12033 of the slip opinion,

> "The City supervised the organization more closely than it had before, by sending city officials to monthly meetings; asked the FHF to "curtail the amount of exposure" it gave discrimination complaints; and contacted other cities to complain about the FHF. Additionally, the City filed suit against the FHF for breach of contract, which required time and money to defend.", are deleted and replaced with the following two new sentences:
>
> "The City supervised the organization more closely than it had before, by sending city officials to monthly meetings, and also asked the FHF to 'curtail the amount of exposure' it gave discrimination complaints. Additionally, the City contacted other cities to complain about the FHF and also filed suit

against the FHF for breach of contract, which required time and money to defend.[5]"

3. The following footnote number 5 is added at the end of the second new sentence:

[5] The City's right to engage in these types of activities may be protected under the Noerr-Pennington doctrine, named after the two Supreme Court cases, *Eastern Railroad Presidents Conference v. Noerr Motor Freight, 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961)*, and *United Mine Workers of America v. Pennington, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965)*. The Noerr-Pennington doctrine was originally developed to protect companies who lobbied the government or who sought redress from the courts from liability under the Sherman Act. See, e.g., *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc. 508 U.S. 49, 56, 123 L. Ed. 2d 611, 113 S. Ct. 1920 (1993)* ('Those who petition government for redress are generally immune from anti-trust liability.'). This doctrine has been extended beyond its original context, and may be invoked in at least some limited cases by governmental entities, *Manistee Town Ctr. v. City of Glendale, 227 F.3d 1090, 1094 (9th Cir. 2000)* (holding that city may invoke Noerr-Pennington defense to protect lobbying of county government). "But even if we were to apply Manistee to the City's alleged conduct in this case, the City's third-party suit against the FHF would not be protected activity under the Noerr-Pennington doctrine if it was 'objectively baseless.' *Prof'l Real Estate Investors, 508 U.S. at 60.* In addition, the City's communications with other cities regarding FHF must constitute 'petitioning' within the meaning of Manistee. *Manistee, 227 F.3d at 1093-94.* It is not clear from this record whether these standards are met and, therefore, whether the City ought to be able to claim a Noerr-Pennington defense with regard to these two types of conduct. Because there are genuine issues of fact regarding the City's alleged retaliatory conduct, we leave these issues for the district court to resolve on remand. With regard to the other allegedly retaliatory conduct, the doctrine does not apply and the City has no Noerr-Pennington defense."

Supreme Court, U.S.
FILED
MAR 22 2002

No. 01-1201

In the

Supreme Court of the United States

CITY OF LAKEWOOD,

Petitioner,

v.

FAIR HOUSING FOUNDATION OF LONG BEACH,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT FAIR HOUSING FOUNDATION OF LONG BEACH

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SUMMARY OF ARGUMENT

Petitioner City of Lakewood ("Lakewood" or "City") strains to create reviewable issues for this Court when, in fact, it is simply unhappy with the well-reasoned, unanimous decision of Ninth Circuit Judges Noonan, Silverman and Paez. The questions presented for review by petitioner turn the underlying opinion upside down by focusing on its constitutional rights, and ignoring the rights of respondent Fair Housing Foundation of Long Beach ("FHF"). In actuality, the appropriate inquiry at the appellate level was whether petitioner was entitled to summary judgment on *respondent's* claims of violation of its constitutional and statutory rights. The Circuit Court decided that Lakewood was entitled to summary judgment on FHF's First Amendment claim, but that there were disputed facts on the Fair Housing Act claim necessitating reversal. As this Opposition will point out, there is nothing novel or unusual about the Ninth Circuit's holding in this case, let alone anything that would demonstrate the need for this Court to review the decision. Petitioner's cries of circuit conflict and First Amendment violation are phantom issues manufactured solely to justify *certiorari*. Indeed, the Ninth Circuit's decision is solidly based in the decisions of this and other courts.

Respondent's points are briefly summarized as follows:

1. Petitioner is incorrect when it argues that, if conduct does not violate the First Amendment, it therefore may not violate any other law.

2. The decision that respondent FHF was not protected by the First Amendment from a patronage dismissal because it was a "policymaker", is not determinative of whether it was protected under the Fair Housing Act from petitioner's retaliatory conduct. Courts around the country have consistently analyzed the additional

claims of persons whose First Amendment claims were dismissed because they were found to be policymakers under the standards applicable to those claims.

3. Triable issues of fact exist regarding whether Lakewood violated the Fair Housing Act ("FHA") after conduct protected, or even arguably protected, under the *Noerr-Pennington* First Amendment doctrine, or the First Amendment generally, is excluded from consideration. The Ninth Circuit was correct when it concluded that most of Lakewood's conduct was not protected by *Noerr-Pennington*, and for that which may have been, the record was inadequate to allow summary judgment.

4. The Ninth Circuit's decision that respondent FHF had standing to bring an FHA claim is consistent with Congressional intent and prior decisions of this Court and circuits around the country. This Court has consistently held that standing under the FHA extends to the full limits of Article III, a proposition consistent with the broad remedial purpose of the FHA. The Housing and Community Development Act does not limit the scope of the FHA.

I. STATEMENT OF FACTS.

The *Walker* opinion adequately summarized the salient facts, and we refer the Court to the opinion. Here, we will highlight certain facts.[1] FHF operated a fair housing counseling program for Lakewood under contract, a practice common among many cities as a means of meeting its Community Development Block Grant ("CDBG") obligations, and had done so since 1990 after being urged to hire a professional fair housing organization by federal regulators concerned about Lakewood's performance. As a condition of receiving CDBG funds, the City was obligated to have a

---

[1] Facts not stated by the Ninth Circuit opinion are contained in the underlying record.

housing program for the City that operates to "affirmatively further fair housing." The contract expressly stated that "*neither City nor any of its officers or employees shall have any control over the conduct of FHF's activities* or the employees of FHF.... it being distinctly understood that FHF is, and shall at all times remain as to City, a wholly independent contractor..." (emphasis supplied). The purpose of the clause was to ensure that FHF could always exercise its independent judgment regarding how best to further the interests of fair housing, unhindered by political or other considerations.

The contract required that FHF submit regular reports to establish that services were being provided as called for by the contract, and FHF did so. Prior to the events surrounding this litigation, the City did not seek to confer with FHF on, or direct FHF in, FHF's performance; did not audit or directly monitor FHF's performance, and did not communicate any dissatisfaction with FHF's performance. FHF operated out of its own facilities, not out of the City's offices. It did not interact daily or even routinely with City officers or employees on the specifics of the fair housing claims presented to it. FHF investigated housing discrimination complaints (for all cities it contracted with, including Lakewood) pursuant to uniform standards derived from training and/or guidelines received by FHF personnel on how to comply with the applicable federal standards, with which its contract with Lakewood obligated it to comply. Consistent with such practices, FHF assured complainants that FHF would hold the specifics of the investigations it conducted confidential, and FHF sought to do just that.

FHF considered itself obligated to investigate all complaints of discrimination that it considered meritorious. Its determinations of the merits of any matter brought to its attention were not influenced in any respect by who might be affected by their conclusions, whether it be a city official or a partisan supporter of any city official. It had only one job – to

bring to bear its knowledge, training and skills to most effectively fight housing discrimination.

On September 2, 1992, a group of tenants and former tenants of the Park Apartments complex in Lakewood (the "Park Tenants" or "Park Plaintiffs") contacted the FHF, alleging that the Park Apartments management company was engaged in racial discrimination and harassment. After complainants requested that FHF refer the case to private counsel, a standard practice by fair housing organizations, FHF contacted the law firm of Traber, Voorhees & Olguin, which unsuccessfully attempted to resolve the case prior to litigation.

On July 29, 1993, FHF advised the City that the residents of the Park Apartments were going to file a lawsuit against the owners and managers of the complex and that a press conference was going to be held at FHF's offices on the following day. FHF provided the City with a copy of the press release and a "case narrative," outlining the history of the anticipated litigation. The press release included a statement by the FHF's Executive Director that the conduct at issue "send[s] the message to yet another generation of young African-Americans that they are still not welcome in middle class cities *like* Lakewood" (emphasis supplied). The Executive Director testified that this was not a comment about Lakewood, but Lakewood nonetheless took it as a direct accusation of racism.

The Park Tenants filed suit on July 30, 1993, claiming violations of the Fair Housing Act, among other things. (That action was ultimately resolved by a consent decree approved by then-District Judge Wardlaw on April 2, 1997.) On August 4, 1993, Scott Barker, Vice President of the Park Apartments' management company and a named defendant in the Park lawsuit, sent a letter to City officials complaining about the lawsuit, and FHF's investigation and aiding of the Tenants. Barker asked the City officials to "[p]lease review the policies

of the Foundation and ask them to truly investigate claims prior to making statements in the newspaper." The top of the letter had a handwritten note saying, "We will be responding to this request!-Jack G." Jack Gonsalves is Assistant Director of Community Development for the City. On August 17, 1993, Charles K. Ebner, the City's Director of Community Development, sent a letter to FHF requesting a meeting to discuss "possible contract violations." Ebner wrote FHF a second letter, on September 23, 1993, contending that FHF "exercised poor judgement [sic] concerning the press release and conference in The Park apartments case.... The handling of The Park apartments case, and in particular the press conference, leaves us with serious concerns for the future.... Quite frankly we are looking for some assurance on the part of FHF that a similar scenario will not occur in the future and that you will have more regard for the community of Lakewood."

The City showed continual displeasure towards FHF, and sought in various ways to limit and/or chill its activities protected under the FHA. Among other things, the City sought confidential information regarding the tenants' claims and sought to have FHF modify its uniform case practices to avoid any future recurrence of what had happened in the Park Apartments case. The City asked FHF to substantially limit the aid and assistance provided to those complaining of perceived housing discrimination, to keep the City better informed of the details of its cases, and to transfer final responsibility for resolution of its cases to the City. When FHF agreed to only minimal changes, and offered detailed explanations for its position, the City sought to force FHF into making the changes through a variety of acts including, but not limited to:

- Withholding, for several months, funds earned by FHF under its contract, while continuing to seek changes in the way FHF conducted business;
- monitoring FHF board meetings and activities;

- subjecting FHF's contract activities to heightened scrutiny;
- making statements that FHF was unreliable and had acted wrongly in the City's discussions with representatives of the federal regulator, the Dept. of Housing & Urban Development ("HUD"); and
- making statements that FHF was unreliable and had acted wrongly in contacts with other city governments with whom Lakewood knew FHF was also under contract.

By the end of 1993, FHF concluded that the City did not intend to renew its contract for the following year, and that the City was retaliating, and would continue to retaliate against FHF. After learning that the tenants planned to amend their lawsuit to include Lakewood itself as an added defendant, FHF decided to also seek redress for the City's conduct against it. FHF therefore sought to join the lawsuit, both as a class representative and for redress for its claim that the City was interfering in FHF's proper functioning as a fair housing services provider, engaging in retaliatory acts for FHF's course of conduct in assisting the tenants with their claims, and refusing to change its practices to those desired by the City. The District Court allowed the tenants to add Lakewood to the lawsuit, but it did not allow FHF to join the action. Instead, the court stated that FHF could pursue a separate case if it chose to do so.

Although the City had renewed FHF's contract from 1990 to 1993 without requiring FHF to submit a new bid each year, the City sent out requests for proposals to various fair housing organizations to replace the FHF. The City did not ask FHF for a bid. Only the Fair Housing Council of San Bernardino and FHF, which submitted a bid despite not receiving a request (which was the lowest bid), submitted proposals. FHF contends it was excluded from consideration, and the San Bernardino Fair Housing Council was chosen to receive the 1994-95 contract. FHF further

contends that Lakewood solicited a fair housing organization that would not engage in aggressive enforcement of the fair housing laws, including a lack of testing.

The City filed a third-party complaint against FHF and Shull for breach of contract and indemnity. In response, FHF filed a counterclaim against the City alleging interference and retaliation in violation of the FHA, the FEHA, and the First Amendment. Judge Tashima dismissed the complaint against Shull, and the breach of contract claim against FHF. District Judge Tevrizian granted summary judgment for FHF on the City's indemnity claim, and for the City on FHF's state and federal fair housing claims. The district court held that FHF did not have standing to sue under the FHA because the contract between the parties governed FHF's legal obligations and contemplated termination of the relationship. The district court also held that FHF did not have standing under the FEHA because that statute does not extend protection to independent contractors. Subsequently, the district court also granted summary judgment for the City on FHF's First Amendment retaliation claim. The Ninth Circuit reversed the former summary judgment and upheld the latter.

Petitioner's brief completely ignores the legal significance of the fact that this case was an appeal from a summary judgment. On an appeal from summary judgment, the reviewing court must determine *de novo*, viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Walker v. City of Lakewood*, 272 F.3d 1114, 1122 (9th Cir. 2001); Federal Rule of Civil Procedure 56(c). This is significant because there are several instances of retaliatory conduct by the petitioner that the court considered in reaching its determination aside from conduct that implicated the First Amendment. In this case, when respondent FHF began to aid and encourage residents of an

apartment complex in the exercise of their fair housing rights, Lakewood retaliated by engaging in the following conduct: 1) it withheld payment to FHF which had been due under contract for several months; 2) it sent a letter suggesting that the City would not renew FHF's contract unless FHF apologized for its protected conduct; 3) it supervised FHF more closely than it had before; 4) it sent City officials to monitor FHF's monthly meetings; 5) it told FHF to curtail the amount of exposure it gave discrimination complaints; 6) it replaced FHF as the overseer of the City's fair housing program by refusing to renew FHF's contract; 7) it excluded FHF from competing for a subsequent contract; 8) it interfered with FHF's contract with another city by calling the Housing Manager for that city to complain about FHF's performance; and 9) it sued FHF for breach of contract. (The Ninth Circuit determined that, regarding the last two of these, it was "not clear from this record whether... the City ought to be able to claim a *Noerr-Pennington* defense," and left those two issues "for the district court to resolve on remand. With regard to the other allegedly retaliatory conduct, the doctrine does not apply and the City has no *Noerr-Pennington* defense." *Walker*, *supra*, at 1130, fn. 5.)

II. THE FACT THAT FHF'S POSITION AS A POLICYMAKER IMMUNIZED LAKEWOOD'S CONDUCT FROM FIRST AMENDMENT SCRUTINY DOES NOT MAKE THAT CONDUCT IMMUNE FROM SCRUTINY FOR VIOLATION OF OTHER STATUTES.

For the conduct described above, FHF sought to impose 42 U.S.C. §1983 liability on the City for retaliating against FHF's exercise of its First Amendment rights. The Ninth Circuit found that, under the *Elrod-Branti* line of

cases,[2] FHF occupied a policymaking position for the City, making it susceptible to termination for purely political reasons without violating the First Amendment. *Walker*, *supra*, at 1132. Thus, Lakewood could retaliate against FHF for its exercise of otherwise protected speech. *Id.* From this holding, Lakewood makes a rather bold assertion: since its conduct did not violate FHF's First Amendment rights, the same conduct cannot serve as the basis for liability under the Fair Housing Act or *any other law*. Lakewood does this by distorting the *Elrod-Branti* framework, stating that *Elrod-Branti* stands for the proposition that termination of a policymaker is independently protected First Amendment conduct, rather than the correct proposition that "there are certain types of public employment where political belief may be an appropriate job requirement, and *the First Amendment does not bar dismissal on political grounds.*" *Pleva v. Norquist*, 195 F.3d 905, 911 (7th Cir. 1999) (emphasis supplied). Thus, the *Elrod-Branti* analysis provides not that government officials are engaged in protected First Amendment activity, but that the First Amendment does not protect a terminated policymaker. The lack of a policymaker's First Amendment protection from termination does not immunize an employer from all liability, but only from liability on claims that it violated the First Amendment to do so.

Lakewood's argument is even more audacious when one considers that it cites no authority for the proposition and, instead, distorts opinions from various circuits. A brief scan of opinions from courts nationwide, however, indicates the opposite – that conduct deemed not violative of the First Amendment under *Elrod-Branti* must nonetheless be separately scrutinized under other applicable laws at issue to determine whether they were violated. While some opinions consider the policymaker status in analyzing the

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[2] *Elrod-Branti* is a shorthand reference to *Elrod v. Burns*, 427 U.S. 347, 96 S. Ct. 2673, 49 L. Ed. 2d. 547 (1976), and *Branti v. Finkel*, 445 U.S. 507, 100 S. Ct. 1287, 63 L. Ed. 2d 574 (1980).

requirements of other claims (e.g., the observation in *Pleva, supra*, that the plaintiff's policymaker status meant that a discretionary decision to terminate did not violate equal protection, which requires absence of a rational basis), they all analyze each claim separately, and none suggest that the First Amendment analysis was dispositive of the other claims. In *Duriex-Gauthier v. Lopez-Nieves*, 274 F.3d 4 (1st Cir. 2001), for example, after holding that termination of a "policymaker" on political affiliation grounds did not violate the First Amendment, the court conducted a separate analysis to determine whether the defendant was entitled to qualified immunity on a due process claim. *Duriex-Gauthier, supra*, at 12. In *Pleva v. Norquist*, 195 F.3d 905 (7th Cir. 1999), *supra*, the court found plaintiff was a "policymaker" and hence subject to *Elrod-Branti* exemption for patronage dismissals. The court then analyzed plaintiff's termination under the Fourteenth Amendment's due process clause, the Age Discrimination in Employment Act, and state contract law. *Id. See also Soderstrum v. Town of Grand Isle*, 925 F.2d 135 (5th Cir. 1991) (termination of policymaker also analyzed under due process clause); *Mazus v. Dept. of Transportation, Com. of Pennsylvania*, 629 F.2d 870 (3rd Cir. 1980) (termination evaluated under *Elrod-Branti* and Title VII sex discrimination); *Steele v. City of Bluffton*, 31 F. Supp. 2d 1084 (N.D. Ind. 1998) (termination of policymaker also analyzed under ADEA and ERISA). None of the cases involved the Fair Housing Act, whose breadth is coextensive with Article III. (See discussion in Section IV, *infra*.)

These cases reflect that the variety of constitutional rights and statutes are animated by different policy concerns, and are intended to remedy separate wrongs. An employee, for example, may allege that he was terminated both due to his political beliefs and due to his race. If we were to follow Lakewood's argument to its logical conclusion, a finding that the employee occupies a policymaking position, and is exempt from First Amendment protection, precludes the employee from seeking redress for his racial discrimination

claim regardless of how overt the discrimination may be. This would mean that, at the policy-making level, a government could adopt an overt policy that no one other than whites would be hired. To state the proposition is to demonstrate its obvious fallacy. In the instant case, Lakewood engaged in certain conduct in retaliation for FHF's exercise of First Amendment speech, because of FHF's role in assisting in the enforcement of fair housing laws. The Ninth Circuit correctly analyzed the First Amendment issue under *Elrod-Branti*, and the fair housing issue under the FHA.

There is one instance, not applicable here, where First Amendment "policymaker" analysis intersects with federal statutes, and that is with respect to the definition of a covered "employee" under Title VII and the ADEA. Title VII defines an "employee" as

> "an individual employed by an employer, except that the term 'employee' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or *an appointee on the policy making level* or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office." 42 U.S.C. §2000e(f) (emphasis supplied).

The ADEA definition of "employee" is virtually identical, and exempting "appointees on the policy making level" from the Act. *See* 29 U.S.C. §630(f).

There is a split of authority on whether the test for determining if an employee is at the "policy making level", and is thus exempt from the protections of Title VII and the ADEA, should be the same test (*Elrod-Branti*) for

determining if an employee is a "policymaker" exempt from First Amendment protection. This will typically occur in cases where the terminated employee raises multiple claims under the First Amendment, and Title VII or the ADEA. The Seventh Circuit has used a single test to resolve the policymaker question under both the First Amendment and the employment discrimination statutes. *See Americanos v. Carter*, 74 F.3d 138, 143-44 (7th Cir. 1996); *O'Neill v. Indiana Commission on Public Records*, 149 F. Supp. 2d 582, 587-88 (S.D. Ind. 2001) ("In the Seventh Circuit, the test for determining whether an individual is a 'policymaker' and therefore not an 'employee' under Title VII is the same test applied by Supreme Court, first delineated in *Elrod v. Burns*"). In the Second Circuit, the analysis of employee status as a policymaker for First Amendment purposes does not control the Title VII inquiry. *Butler v. New York State Department of Law*, 211 F.3d 739, 746 (2nd Cir. 2000). Rather, the Second Circuit looks to the language of the discrimination statute at issue and to Congressional intent to define a policymaker. *Butler, supra*, at 747. *See also Tranello v. Frey*, 962 F.2d 244, 250 (2nd Cir. 1992). A District Court in the Fifth Circuit has similarly rejected an invitation to graft the *Elrod-Branti* exemption onto the Title VII definition of covered employees. *Gomez v. City of Eagle Pass*, 91 F. Supp. 2d 1000, 1005 at fn. 2 (W.D. Tex. 2000).

Under Lakewood's analysis, there should be no need for any such discussion or analysis because the status as a policymaker would be a *per se* bar to the other claims regardless of how the statute read. This line of cases, and the underlying statutes, make crystal clear that the question of whether someone is a policymaker is only relevant to the First Amendment analysis, unless a statute incorporates a similar test, such as Title VII and ADEA but not FHA. If a policymaker were automatically exempt from scrutiny for the same conduct under other statutes, there would be no need for Congress to carve out a policymaker exception in the

statute, as it has done under Title VII and the ADEA, but not under Title VIII.

III. NEITHER THE *NOERR-PENNINGTON* DOCTRINE NOR THE FIRST AMENDMENT ABSOLUTELY PROTECTS LAKEWOOD FOR THE RANGE OF ITS CONDUCT IN THIS CASE.

In finding that FHF presented enough triable issues of fact to survive summary judgment on its Fair Housing Act claim, the Circuit Court took great pains to point out that, even if certain of Lakewood's conduct could be deemed legitimate petitioning activity and thus protected under the *Noerr-Pennington* [*Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961) ("Noerr"), and *United Mine Workers of America v. Pennington*, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965) ("Pennington")] doctrine, there were sufficient instances of unprotected retaliatory conduct to form the basis of an FHA claim. *Walker*, *supra*, at 1130. It is misleading for Lakewood to argue that the Ninth Circuit greatly expanded the "interference" clause of the FHA to reach protected speech, given that the record establishes conduct that is not protected speech (*e.g.*, withholding payment due under the contract, the letter from Lakewood stating that payments would be withheld until FHF apologized, and demanding that FHF "curtail the amount of exposure" it gave discrimination complaints).

Noerr-Pennington only protects activity that takes the form of lobbying the government for redress. *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 56, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993). The conduct for which there was no *Noerr-Pennington* protection included, in addition to that listed in the prior paragraph, sending a letter suggesting that the City would not renew FHF's contract unless FHF apologized for its protected conduct; supervising the FHF more closely than it had before;

sending City officials to monitor FHF's monthly meetings; and excluding FHF from consideration for a subsequent contract.

Further, under *Noerr-Pennington*, speech is not always immunized when it is combined with unlawful conduct. The evolution of *Noerr-Pennington* immunity and its exceptions began in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961). The defendants argued that the Sherman Act could not create liability for informing the public and the legislature of certain facts. This Court agreed, noting that "no violation of the [Sherman] Act can be predicated upon *mere attempts* to influence the passage or enforcement of laws." *Id.* at 135, 81 S. Ct. at 528 (emphasis supplied).

However, where defendants have combined legal activities such as lobbying with the unlawful objective of price fixing, the analysis differs. "It is well settled that *First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute.*" Precious as First Amendment rights are, they "may not be used as the means or the pretext for achieving substantive evils." Accordingly, a "combination of entrepreneurs to harass and deter their competitors from having 'free and unlimited access' to the agencies and courts, to defeat that right by massive, concerted, and purposeful activities of the group are ways of building up one empire and destroying another.... If these facts are proved, a violation of the antitrust laws has been established. If the end result is unlawful, it matters not that the means used in violation may be lawful." *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510, 514, 92 S. Ct. 609, 611, 30 L. Ed. 2d 642 (1972)(emphasis supplied). *See also Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1263-64 (9th Cir. 1982), *cert. denied* 459 U.S. 1227, 103 S. Ct. 1234, 75 L. Ed. 2d 468 (1983)("When [First Amendment

protected] petitioning activity is but a part of a larger overall scheme to restrain trade, there is no overall immunity....Here, the allegation is that the defendants conspired to fix rates and allocate customers, and used the protest mechanism of the ICC to further this conspiracy. Protests before the ICC are legitimate mechanisms for enforcing rights. Even if the protests to the ICC were legitimate, if they were part of a larger antitrust conspiracy, the conspiracy is subject to the antitrust laws").

Very little of Lakewood's conduct can be construed as lobbying or petitioning in any sense. The Ninth Circuit acknowledged that the *Noerr-Pennington* doctrine may be available to Lakewood to insulate itself from FHA liability for two specific types of conduct: (a) contacting other cities to complain about FHF, and (b) filing a lawsuit against FHF. *Walker*, *supra*, at 1130, fn. 5. ("The City's right to engage in these types of activities may be protected under the Noerr-Pennington doctrine....") However, the court rightly remanded the matter to the trial court to resolve factual issues as to whether complaining to other cities constituted petitioning, and whether Lakewood's lawsuit against FHF was a sham and objectively baseless. Even if *Noerr-Pennington* did reach this conduct, it did not reach the other conduct discussed above.

Nor can it be said that Lakewood's conduct constituted protected "advocacy" within the meaning of *White v. Lee*, 227 F.3d 1214 (9th Cir. 2000).[3] *White* is a pure speech case, where there was no exercise of any

[3] *White v. Lee* held that certain acts of advocacy such as the issuance of a newsletter designed to rally opposition against a housing project is protected under the First Amendment. However, *White* is distinguishable in that both it and the case upon which it relies, *Brandenburg v. Ohio*, 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969), specifically address the right of *private citizens* to advocate without limitation by the government. It is not applicable to a situation where, as here, the *government* is engaging in the advocacy. More fundamentally, *White v. Lee* involved only acts of advocacy, unlike the facts here, which included a variety of specific governmental conduct aimed at FHF, including withholding of funds.

governmental or coercive power. It does not address a situation where, as here, the unlawful activity involved coercive power and conduct, and transcended mere speech and advocacy. While Lakewood did proffer evidence of a non-retaliatory reason for its actions, that does not change the conclusion. FHF presented enough evidence to create disputed issues of fact on the issue of pretext to warrant moving forward with the FHA claim. *Walker, supra*, at 1130. It is not for the reviewing court on appeal from a summary judgment to determine disputed issues of fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). It is the court's duty to remand disputed issues to the trier of fact, which is what the Ninth Circuit did in this case.

The overwhelming weight of authority refutes Lakewood's contention that the First Amendment issue is dispositive of liability in this case. Lakewood essentially assumes that First Amendment protections for speech and associational activity is absolute, or nearly so. However, it is well established that conduct protected by the First Amendment may still be relevant evidence in a court proceeding, and that such evidence is not judged by the incitement to violence standards of *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969). In *Wisconsin v. Mitchell*, 508 U.S. 476, 480, 113 S. Ct. 2194, 124 L. Ed. 2d 436 (1993), the Supreme Court upheld the constitutionality of a Wisconsin penalty-enhancement statute based on intentional selection of a victim because of the victim's race, religion, color, disability, sexual orientation, national origin or ancestry. The Wisconsin Supreme Court had held that the statute violated the First Amendment by punishing offensive thought, *i.e.*, the racist motive behind the selection of the victim. A unanimous U.S. Supreme Court, in an opinion by Justice Rehnquist, reversed. The Court reasoned that the "*First Amendment...does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent.*" *Id.* at 489 (emphasis

supplied). Nor does the Constitution "erect a per se barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment." *Id.* at 486. *See also Dawson v. Delaware*, 503 U.S. 159, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992)(membership in Aryan Brotherhood not admissible in circumstances of that case because it was not sufficiently connected to any legitimate sentencing issue, but would be if nexus were shown); *Barclay v. Florida*, 463 U.S. 939, 103 S. Ct. 3418, 77 L. Ed. 2d 1134 (1983)(plurality opinion)(evidence of racial animus evidence admissible to determine capital punishment).

IV. CONDUCT WITHIN THE PURVIEW OF THE HCDA IS NOT THEREBY EXEMPT FROM PROVIDING A BASIS FOR VIOLATION OF OTHER STATUTES.

The Ninth Circuit is correct that nothing in the Housing and Community Development Act ("HCDA"), 42 U.S.C. §§5301-5321, prevents an aggrieved party from proceeding under a statute, such as the FHA, if the defendant's use of HCDA funds violates that other statute. *Walker*, *supra*, at 1127. To argue, as Lakewood does, that the City "merely decided not to use the funds it received from HUD to pay FHF" is to engage in the type of inference-making that is properly left to the trier of fact. *Anderson*, *supra*, at 249 ("[T]he judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial"). This is particularly true when there was sufficient evidence from which to infer a retaliatory motive for Lakewood's conduct. *Id.*[4] If there is an inference to be made, it should be made in

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[4] Petitioner's reliance on *Nabke v. U.S. Dept. of Housing and Urban Development*, 520 F. Supp. 5 (W.D. Mich. 1981), a district court decision, is to no avail. *Nabke* merely concluded that no private right of action exists under the HCDA, a wholly unremarkable proposition. *Nabke* did not involve a claim that the conduct violated the FHA or any other statute.

favor of the nonmoving party in this case, FHF. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 135, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000).

Recognizing that the HCDA does not abrogate the private right of action found in the Fair Housing Act, is consistent with the broad remedial purposes of Title VIII. "The language of the Act is broad and inclusive." *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 209, 93 S. Ct. 364, 34 L. Ed. 2d 415 (1972). Vesting a private right of action in fair housing services organizations such as FHF encourages the complainants to act, not only on their own behalf, but also as private attorneys general in vindicating a policy that Congress considered to be of the highest priority, *i.e.*, eliminating discriminatory housing practices. *Trafficante, supra*, at 208. If, as this Court stated in *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372, 102 S. Ct. 1114, 71 L. Ed. 2d 214 (1982), "'Congress intended standing under [the FHA] to extend to the full limits of Art[icle] III'" (quoting *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 103, n. 9, 99 S. Ct. 1601, 60 L. Ed. 2d 66 (1979), then the fact that the HCDA does not provide a private right of action has no bearing on the breadth of the FHA.

V. CONCLUSION.

For the reasons stated above, this court should deny the petition for a writ of certiorari.

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No. 01-1201

In the

Supreme Court of the United States

CITY OF LAKEWOOD,

Petitioner,

vs.

FAIR HOUSING FOUNDATION OF LONG BEACH,

Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Respondent's brief in opposition to the City of Lakewood's Petition for Writ of Certiorari (the "opposition brief") makes numerous arguments that are not well taken and that have not been previously addressed by the parties or the courts.

First, the opposition brief focuses on evidentiary and law and motion standards, arguing that this Court should not interfere with the Ninth Circuit's finding that there were triable issues of fact that made it improper for the district court to grant summary judgment for the City of Lakewood (the "City"). This is beside the point because it is not the ground upon which certiorari is (or could be) sought.[1] Certiorari is sought because there is a *published* appellate court opinion, which constitutes binding precedent in the Ninth Circuit, that misstates and misapplies the law and is in conflict with other published circuit court opinions on important constitutional and statutory questions. *Walker and Fair Housing Foundation of Long Beach v. City of Lakewood*, 272 F.3d 1114 (9th Cir. 2001). In fact, it was only by ignoring this prior precedent -- including its own published opinion in *White v. Lee*, 227

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[1] As the Court is well aware, certiorari exists to allow review of important and broadly-applicable legal issues, not to resolve disputes between particular parties. Nonetheless, if this Court resolves the legal issues raised in the City's writ petition in its favor, there will be neither a basis for remand, nor factual issues to decide on remand.

F.3d 1214 (9th Cir. 2000) - - that the Ninth Circuit was able to rationalize its decision in this case. For example, the court had to completely overlook its holding in *White* that the "interference" clause of the Federal Fair Housing Act ("FHA") must be narrowly construed when applied to speech and *only* outlaws speech which is intended to incite and likely to incite imminent lawless activity. *Id.* at 1230. Rather than applying this well-established legal standard (which would have immunized the City from liability for its speech), the court instead held that the interference clause should be broadly construed, and that the alleged speech of City officials herein would violate that clause unless it also constituted "petitioning." *Walker, supra,* at 1129, n. 5.[2] In short, without any explanation for why it was doing so, the Ninth Circuit imposed a completely different standard on the City and its officials than it (and other circuit courts) had previously applied to determine whether speech violates the FHA. Moreover, although respondent tries to construct an after-the-fact rationale for this special rule based on the City's governmental position, there is no support for its argument in either the Ninth Circuit's opinion (which ignores *White* and is silent as to

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[2] Much of the speech at issue in *White* did not constitute an attempt to "petition the government for redress of grievances," but it was nonetheless deemed protected by the First Amendment because it did not advocate violence. *White, supra,* at 1221-22, 1230.

why the court created a special rule for the City[3]), or prior case law. *See, e.g., Manistee Town Center v. City of Glendale*, 227 F.3d 1090, 1093 (9th Cir. 2000) (rejecting assertion that government officials and entities are not entitled to First Amendment protections afforded private citizens).

Second, the opposition brief focuses on whether each of *the City's* alleged responses to respondent's speech/advocacy constitutes protected speech (as opposed to conduct), rather than on the dispositive issue before the Court, to wit, whether *respondent's* speech/advocacy is protected given *respondent's* policymaking status. The Ninth Circuit held that, because respondent was a policymaker, the City could not be held liable for *any* of its allegedly retaliatory responses to respondent's advocacy under the First Amendment. However, it nonetheless found that the City could be held liable for this *exact same* responsive conduct under the FHA. This holding flies in the face of the precise reason for the policymaker exception - - that "the effective operation of government would be compromised by requiring a public official to retain a

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[3] In fact, the Ninth Circuit's original opinion ignored the City's First Amendment rights altogether. Only on rehearing did the court recognize that City officials have First Amendment rights. However, it then limited and interpreted those rights in a way that was inconsistent with prior case law.

potential political enemy in a position of responsibility"[4] -- a policy concern which plainly applies irrespective of whether a claim is brought under the First Amendment or the FHA. Moreover, it is inconsistent and entirely nonsensical for the Ninth Circuit to, on the one hand (*i.e.*, in *White)*, hold that, if *nonviolent* discriminatory or retaliatory speech is curtailed by the FHA, the speaker has a cause of action under the First Amendment, and, on the other hand (*i.e.*, in *Walker*), to issue a decision that gives the object of nonviolent retaliatory or discriminatory speech a corollary and reciprocal right to sue the speaker under the FHA. *Compare*, *White, supra* at 1228-30 (plaintiffs whose non-violent but discriminatory speech is curtailed by threat of FHA liability can sue party making threat), with *Walker, supra* at 1129, n. 5 (FHA can be used to curtail speech unless it constitutes an attempt to petition the government for redress of grievances).[5]

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[4] *Pleva v. Norquist,* 195 F.3d 905, 912 (7th Cir. 1990).

[5] Respondent contends that the applicable case law establishes only that the City's alleged actions were not unlawful, not that its conduct was protected by the First Amendment. In reality, the cases establish that the City has a First Amendment right to refuse to associate with disloyal policymakers, as well as a right to assert that its own First Amendment rights are violated if the FHA is used as a tool to curtail its protected speech. *Pleva, supra,* at 912; *White, supra,*

Third, the opposition brief asserts that, taking the City's position to its logical extreme, a policymaking employee fired both for his or her race and in retaliation for speech could not assert a race discrimination claim under Title VII of the Civil Rights Act. This is another red herring unrelated to the issues presented to the Court. In this case, the Ninth Circuit held that retaliation *for advocacy or association* could violate the FHA but not the First Amendment, *i.e.*, the exact same conduct could trigger liability under one provision but not the other. This is entirely different from a situation where a party claims that he or she was retaliated against for something other than advocacy or association (*e.g.*, the *color of his or her skin*), and the policymaker exception does not apply in this latter situation.[6]

Fourth, the opposition brief implies (but does not actually state) that, in *Pleva v. Norquist*, 195 F.3d 905 (7th Cir. 1990), the Seventh Circuit dismissed the plaintiff's constitutional claims on grounds other than, and unrelated to, its finding that the plaintiff was a policymaker. This is,

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at 1128-1130.

[6] The antitrust cases cited by respondent (at pp. 14-15 of the opposition brief) are inapposite for this same reason, *i.e.*, they are not cases involving associational rights or constitutionally-permissible retaliation against a policymaker for speech or advocacy.

once again, inaccurate. The Seventh Circuit clearly held that the plaintiff could not assert a substantive due process or equal protection claim precisely because he was a policymaker, rejecting the former claim on the ground that "political disagreement was an appropriate basis" to refuse the plaintiff's request for re-appointment, and the latter claim on the ground that "where policymaking positions are concerned, it is wholly legitimate for a government official to use his discretionary appointment powers to reward his friends and keep his political enemies at a distance." *Id.* at 917. Moreover, none of the other decisions cited in respondent's opposition brief (at p. 10) are to the contrary, or suggest that the principles and rationale behind the policymaker exception do not apply outside the First Amendment context.[7] In contradistinction, the authorities cited in the City's Petition for Writ of Certiorari demonstrate that the courts have repeatedly applied the policymaker principles in cases that were not brought under the First Amendment, for example, in cases where ideologically disloyal or disruptive

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[7] The policymaker principles simply were not implicated in the cases cited by respondent, except in the First Amendment context, because the plaintiffs' other claims either did not seek redress for retaliation based on association or advocacy, or were procedural due process claims that only analyzed the technical aspects (the adequacy of the notice and hearing provided), rather than the substantive propriety, of the plaintiffs' terminations.

employees have sought redress for their terminations under Title VII of the Civil Rights Act. [*See*, the City's Petition for Writ of Certiorari, at pp. 16-17.]

Fifth, as previously discussed, the opposition brief focuses on each of the City's alleged retaliatory responses to respondent's advocacy and analyzes whether a particular response constitutes speech protected by the First Amendment. Not only is this analytical focus misplaced for the reasons explained above, it is fatally flawed for two additional reasons. As a threshold matter, respondent's assertion that conduct such as writing letters or complaining about respondent's conduct is not protected speech ignores the entire body of First Amendment law, as well as the Ninth Circuit's decision in *White* that such speech is protected under the FHA as long as it is nonviolent. Moreover, respondent's argument ignores the fact that the First Amendment has both a speech and an association clause. Conduct such as the City's exercise of its contractual right to evaluate whether respondent was performing its agreed-upon professional obligations, a City official's exercise of her First Amendment right to attend public meetings held by respondent, and the determination of City officials that the City should not continue to associate with respondent after its contract expired given respondent's attempt to sue the City and covert association with the law firm suing the City, may not constitute speech. However, these acts do constitute the exercise of protected First Amendment associational rights, to wit, the right *not*

to associate with political or ideological opponents who seek to undermine the effective operation of government. *Pleva, supra,* at 912.

In summary, the instant case is a classic example of a situation in which the grant of certiorari is both necessary and appropriate. The Ninth Circuit's published decision herein is in conflict with prior Circuit Court decisions, and misstates and misconstrues the law on vitally important constitutional and statutory issues. Accordingly, the City of Lakewood respectfully requests that this Court grant its Petition for Writ of Certiorari.

Respectfully submitted,

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